Supreme Court, U.S.
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No. 011503

In The Supreme Court of the United States

CUYAHOGA COUNTY COURT OF COMMON PLEAS, DOMESTIC RELATIONS DIVISION,
Petitioner,

v.

JOSEPH M. POPOVICH AND UNITED STATES OF AMERICA,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED FOR REVIEW

In Title II of the Americans with Disabilities Act of 1990 (ADA), Congress prohibited any public entity, including states, from denying participation in or the benefits of its services, programs or activities to any qualified individual with a disability, by reason of such disability. Aggrieved individuals have a private cause of action.

In enacting the ADA, Congress stated that "[a] state shall not be immune under the Eleventh Amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202 (2002).

The questions presented are:

1. Does Title II of the ADA, 42 U.S.C. §§ 12131 to 12165 (2002), exceed Congress' enforcement authority under section 5 of the Fourteenth Amendment, thereby failing to validly abrogate the States' Eleventh Amendment immunity from private damage claims?
2. Does the abrogation analysis of Title II of the ADA, 42 U.S.C. § 12131 to § 12165 (2002), differ when an individual Title II claim is purportedly tied to due process concerns rather than equal protection concerns?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

Petitioner is the Cuyahoga County Court of Common Pleas, Division Of Domestic Relations. Petitioner is an arm

of the State of Ohio. Ohio Revised Code §§ 2743.01(A) and (B) (1993) and 2301.03(L) (1994); *Mumford v. Basinski*, 105 F.3d 264 (6th Cir. 1997), *certiorari denied*, 1997 U.S. LEXIS 6047 (1997) .

Respondent Joseph M. Popovich is a citizen of Cuyahoga County, Ohio and was a litigant before the Cuyahoga County Court of Common Pleas, Division Of Domestic Relations.

Respondent United States intervened in the Court of Appeals review to defend Title II of the Americans With Disabilities Act.

Cuyahoga County, Ohio was a Defendant in the trial court. It was dismissed following judgment notwithstanding the verdict and was dismissed on appeal.

Amicus curiae briefs were submitted in the Court of Appeals by: Ohio Legal Rights Service (urging affirmance); State of Ohio through the Office of the Attorney General (urging reversal); and the State of Tennessee through the Office of the Attorney General (urging reversal).

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No. 01 - _____

SUPREME COURT OF THE UNITED STATES

October Term, 2001

CUYAHOGA COUNTY COURT OF COMMON PLEAS, DIVISION OF DOMESTIC RELATIONS.[1]

Petitioner,

v.

JOSEPH M. POPOVICH, *et al.*

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

Petitioner prays that a Writ of *Certiorari* issue to the United States Court of Appeals for the Sixth Circuit to review the judgment in this case filed on January 10, 2002.

CITATIONS TO OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Sixth Circuit is reported at 276 F.3d 808 (6th Cir. 2002) ("*Popovich II*"). It is set forth in the Appendix at A1 - A60. The original panel opinion is reported at 227 F.3d 627 (6th Cir. 2000)("*Popovich I*"), *rehearing en banc*

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[1] All remaining parties to this action are identified in the caption. Rule 14. 1(b), Rules of the Supreme Court of the United States.

granted, opinion vacated (6th Cir. 2000) Appendix at A61 - A62. *Popovich I* is set forth in the Appendix at A63 - A102.

The judgment, jury verdict, and judgment entry in the United States District Court for the Northern District of Ohio have not been officially reported. They are set forth in the Appendix at A132 - A136. The district court's Memorandum Opinion and Order (November 19, 1998) is not officially reported. It is set forth in the Appendix at A105 - A 131. The Amended Judgment Entry of November 19, 1998, is found in the Appendix at A103 - A104.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit, *en banc*, was entered on January 10, 2002. No further rehearing could be sought.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1) (2002), to review a civil judgment.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

1. The pertinent provisions of the Fourteenth Amendment of the United States Constitution are as follows:

Amendment 14, Section 1 states:

> ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any such State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction

the equal protection of the laws...

Amendment 14, Section 5 states:

Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(Appendix at A144).

2. The Eleventh Amendment to the United States Constitution states:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

(Appendix at A145).

3. Title II of the ADA is divided into two parts. Part A generally prohibits disability-based discrimination by any public entity. 42 U.S.C. § 12132 (2002). Part B provides specific examples of prohibited discriminatory conduct in public transportation. As relevant here, Title II of the ADA, 42 U.S.C. § 12132(2002) states:

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity.

(Appendix at A137 - A143).

STATEMENT OF THE CASE

1. Respondent Joseph M. Popovich was a respondent in

a post-decree, child custody action filed by his ex-wife in August, 1990 in the Cuyahoga County Court of Common Pleas, Division Of Domestic Relations ("State Court"). Popovich engaged in full discovery and trial preparation for the hearing on the post-decree motions, without incident or other remarkable event. The post-decree hearing commenced in 1992. Popovich had exhausted all hearings and appeals available in the state court system by 1998.

2. Popovich suffers from a mild to moderate hearing loss. During the post-decree hearing, he initially complained to the State Court that he was having difficulty hearing some of the testimony. The State Court ordered Popovich to undergo a hearing test so the court could determine whether any reasonable accommodation was needed. The audiology report confirmed that Popovich had a mild to moderate hearing loss. The audiologist recommended that the State Court provide Popovich with an FM amplification system. To ensure protection of Popovich's rights, the State Court declared a mistrial (August 27, 1992) and commenced the post-decree hearing *de novo,* providing Popovich with an FM amplification system.

3. In October, 1992, approximately 23 days into the post-decree hearing, Popovich complained that he could not continue using the FM system. Again, to accommodate Popovich, the State Court ordered a recess and requested that Popovich provide information concerning, *inter alia,* his prognosis in order to complete the hearing. Popovich ignored

the State Court's directive, and the hearing was scheduled to resume on December 1, 1992. Five minutes before the hearing was to resume, Popovich filed a motion seeking real time captioning. The State Court informed Popovich that the hearing could not go forward with this motion pending, and recessed the post-decree motion hearing to schedule a hearing on Popovich's motion seeking a different accommodation. A hearing to determine whether the accommodation sought would be provided for Popovich was scheduled for February 1, 1993. The hearing of February 1, 1993, was canceled because the referee scheduled to hear the motion became ill and died before hearing the case. Further complicating scheduling, a new judge was assigned following an election.

4. Without waiting to see if further accommodation would be effective, Popovich filed a complaint of discrimination with the Civil Rights Division of the Justice Department. On March 23, 1995, Popovich filed a complaint in the Northern District of Ohio, Eastern Division and on September 15, 1995, he filed an amended complaint. The gravamen of Popovich's claim for damages against the State Court was that the denial of real time captioning as an accommodation caused him to be kept apart from his daughter in violation of Title II of the ADA, 42 U.S.C. § 12131, *et seq*. (2002).

5. A jury trial commenced in federal district court on March 30, 1998, and concluded on April 6, 1998. The jury returned a verdict for Popovich in the amount of four hundred thousand dollars ($400,000). A judgment entry was made on

April 13, 1998, reflecting the verdict. Defendant filed a motion for a new trial, for judgment as a matter of law, and for remittitur on April 23, 1998. A judgment entry pursuant to the jury verdict incorporating future injunctive relief was entered on July 28, 1998. A timely appeal followed. Plaintiff filed a timely cross appeal.

6. The Sixth Circuit reversed the district court, finding that the State Court was immune from Plaintiff's suit under the Eleventh Amendment, dismissing the case without reaching the merits of the Title II claim. The court concluded that Congress was not "enforcing" the Fourteenth Amendment when it passed Title II, as Title II offered protections far beyond those guaranteed by the Equal Protection Clause of the Fourteenth Amendment. Among other things, the ADA's Title II imposes "heightened scrutiny" in disability cases where the Constitution requires only a "rational basis." On December 12, 2000, the court granted rehearing *en banc*, but delayed consideration until the Supreme Court announced its decision in *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001). On rehearing, a sharply divided *en banc* court agreed with the original panel, in part holding, "It is clear after *Garrett* that congressional authority under section 5 to enforce the Equal Protection Clause is limited and will not sustain the Disabilities Act as an exception to Eleventh Amendment state immunity." The circuit distinguished between types of Title II claims with those sounding in equal protection failing

entirely, while claims sounding in due process receive a case-by-case analysis. The court stated:

> [a]s applied to Plaintiff's cause of action, Title II is "appropriate legislation" under section 5 and the Due Process Clause of section 1 of the Fourteenth Amendment.

Appendix at A6.

REASONS FOR GRANTING THE WRIT

Introduction

This Court granted *certiorari* in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) to decide, *inter alia*, whether Title II of the ADA, as applied to the states, validly abrogated state sovereign immunity under section 5 of the Fourteenth Amendment. Because the issue was not fully briefed and not argued, the Court declined to rule on the question. This case presents this important public issue, expressly left open by this Court in *Garrett*. Did Congress exceed its authority under section 5 of the Fourteenth Amendment in subjecting states to private damage suits under Title II of the ADA?

When this Court decided this issue pertaining to Title I in *Garrett*, a conflict among the circuits on the validity of abrogation of sovereign immunity under Title II already existed. After *Garrett*, the circuits remain split on the Title II issue. The Sixth Circuit's *en banc* opinion significantly erodes

the clarity of the jurisdiction of federal courts to hear private damage suits against states under Title II of the ADA. Indeed, the circuit's approach is perhaps the worst of all results, as it adopted the novel idea that jurisdiction would vary case-by-case, depending upon a factual analysis of whether any given ADA Title II claim "sounds in" due process concerns as opposed to equal protection concerns. Thus, states and litigants are faced with unwarranted and continuing uncertainty.

A panel of the United States Court of Appeals for the Sixth Circuit held that the state was immune from plaintiff's ADA suit for damages under the Eleventh Amendment and dismissed the suit.[2] They found that: "... equal protection was not a constitutionally sufficient basis on which to rest the ADA's abrogation of Eleventh Amendment immunity, ..."

On rehearing *en banc*, the full court by a 7 - 6 vote, remanded the case for a retrial in light of potential due process claims. In a vigorous dissent, Judge Ryan criticized the majority's failure to be guided by the analysis of the issue by this Court's decisions in *Garrett, supra; Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); and *City of Boerne v.*

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2 Because sovereign immunity claims are jurisdictional, they cannot be waived even if not presented as a defense to the trial court. See *Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (holding Eleventh Amendment defense cannot be waived, as it divests the court of jurisdiction.).

Flores, 521 U.S. 507 (1997).

The exceptional importance of these questions is emphasized by the granting of *en banc* consideration. Rule 35(a), FEDERAL RULES OF APPELLATE PROCEDURE. The sharp division of the circuit judges sitting *en banc* further demonstrates the importance of resolving these issues.

The conflicting Constitutional principles underlying the Eleventh and Fourteenth Amendments has, in recent years, divided the federal courts and constitutional scholars. However, it is not merely an issue of academic interest.

The *En Banc* Ruling Conflicts with Decisions in Other Circuits

Litigation under Title II of the ADA is increasingly common. Thus, this issue can be expected to arise frequently in the future. *Lee v. County of Los Angeles*, 240 F.3d 754, 776-77 (9th Cir. 2001) ("quite simply, the ADA's broad language brings within its scope anything a public entity does."); *cited with approval in, Hason v. Medical Bd. of Cal.*, 279 F.3d 1167 (9th Cir. 2002). The breadth of Title II makes a determination of its validity by this Court of critical importance to the States.

As the question of whether Title II is a valid abrogation of sovereign immunity to states is far from settled, states are left to guess as to their liability for private claims for damages. This Court has made it clear that federal legislation lacking extensive legislative findings supporting remedies that prevent unconstitutional actions is impermissible

overreaching. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Kimel*, 528 U.S. at 62. This is also applicable to the ADA. *See Garrett*, 531 U.S. at 356.

Circuit courts have not been uniform in their application of the principles enunciated in *Garrett* to Title II. For example, the Ninth Circuit has specifically declined to reexamine Title II under the analysis required by this Court in *Garrett* and has, instead, continued to apply its pre-*Garrett* holdings to Title II. "[W]e ...conclude that *Garrett* does not overrule either *Clark* or *Dare*, and that the Eleventh Amendment does not bar ... Title II claims." *Hason*, 279 F.3d at 1172. *See also*, *Wroncy v. Oregon DOT*, 2001 U.S. App. LEXIS 8761, ___ F.3d ___ (9th Cir. 2001)(post-*Garrett*, finding, without oral argument, that plaintiff stated a Title II claim against the state).

The Ninth Circuit's approach stands in stark contrast to the Fifth Circuit's decision in *Reickenbacker v. Foster*, 274 F.3d 974 (5th Cir. 2001). The Fifth Circuit held,

> We are asked to decide whether Title II of the Americans with Disabilities Act of 1990 ... validly abrogates Eleventh Amendment sovereign immunity. We hold that they do not, and that the state defendant here is entitled to sovereign immunity.

274 F.3d at 976. *See also*, *Thompson v. Colorado*, 258 F.3d 1241 (10th Cir. 2001), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Jan 7, 2002) (No. 01-1024).

Adding to the confusion, the Sixth Circuit in *Popovich II*

and the Second Circuit in *Garcia v. S.U.N.Y.*, 280 F.3d 98 (2nd Cir. 2001), set out alternative approaches to the issue. These cases parse out the statute as if its legislative history was somehow different from the history examined in *Garrett*. Neither affirming nor rejecting the validity of the abrogation of sovereign immunity under Title II, *Popovich II* and *Garcia* assume, without analyzing Title II's sparse legislative history, that there is adequate support for a due process claim, but not equal protection (*Popovich II*), or a "rational basis" analysis albeit not a "strict scrutiny" one (*Garcia*). This "judicial gerrymandering" is without precedent.

The Second Circuit's approach is as equally convoluted as that in *Popovich II*. The court recognizes that Title II's remedies are disproportionate to the harm to be addressed: "the extent to which Title II is neither congruent nor proportional to the proscriptions of the Fourteenth Amendment [is] apparent." 280 F.3d at 109. Nevertheless, the Second Circuit applies a test of statutory validity not endorsed by this Court in *Garrett*. "Although we find that Title II in its entirety exceeds Congress's authority under § 5, this conclusion does not end our inquiry as to whether Title II validly abrogates state sovereign immunity." 280 F.3d at 110.

Without authority, the Sixth and Second Circuits have re-drafted Title II and thereby found partial validity of the statute. The Second Circuit acknowledged as much, stating: "[t]he question, ..., is how Title II monetary claims against the states can be limited so as to comport with Congress's §5

authority." The limitations on the federal courts are clear; crafting a statute is properly a legislative, not a judicial function. It is "...the province of the Judicial Branch...to say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177, 1 Cranch 137 (1803). The judicial branch interprets laws, it does not draft or re-draft them.

> When Congress makes findings on essentially factual issues ... those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue.

Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 330 n. 12 (1985). The Sixth Circuit's attempt to rewrite, rather than review, Title II warrants review by this Court.

The confusion resulting from holdings such as those in *Garcia* and *Popovich II* prejudice not only state entities seeking to assert an Eleventh Amendment immunity defense, but plaintiffs as well. The current uncertainty is amply demonstrated in *Kiman v. New Hampshire Dept. of Corrections*, 2001 U.S. Dist. LEXIS 21894, ___ F.Supp.3d ___(D. N.H. Dec. 19, 2001):

> The Second Circuit has suggested that the Eleventh Amendment does not bar a Title II claim if the plaintiff alleges and proves that the defendant was motivated by discriminatory animus or ill will based on disability. ... Because the plaintiff in this case does not allege that he was the victim of intentional

discrimination, I need not determine whether the Second Circuit's conclusion on this point is correct.

As a result of this conflict, the kind of relief available to a litigant and the liability of the states depends not only on the circuit in which the case arises but, upon how the claim is pleaded, or upon some type of preliminary proceedings to clarify the claim. The Sixth Circuit gave no guidance as to how this classification will work in future cases. But any kind of preliminary process, whether extensive discovery, etc. will violate the principle that immunity is not about immunity from liability, but about preventing the "indignity of subjecting a State to the coercive process of judicial tribunals at the insistence of private parties." *In re Ayers*, 123 U.S. 443, 505 (1887). Further, the holdings in *Popovich II* and *Garcia* are at odds with this Court's ruling in *Swierkiewicz v. Sorema N.A.*, ___ U.S. ___, 122 S.Ct. 992 (2002). Despite the recognition that Rule 8(a)(2) of the FEDERAL RULES OF CIVIL PROCEDURE only requires a short and plain statement of the claim showing that the pleader is entitled to relief, *see Swierkiewicz*, *supra*, *Garcia* necessitates specific pleading to demonstrate an intentional and willful violation of Title II. Indeed, rather than provide certainty to litigants or states, *Garcia* invites a case-by-case analysis to determine whether the challenged conduct was "intentional and willful." *See Bowers v. NCAA*, 171 F.Supp.2d 389 (D.N.J. 2001).

Litigants in the Sixth Circuit fare no better. Under *Popovich II* it will be necessary for courts to pre-determine

the nature of the challenged violation, *i.e.*, determine whether a fundamental right is at stake and whether it implicates due process concerns. Claims sounding in equal protection for money damages are not permitted while those sounding in Due Process remain viable.

The uncertainly of pleading created for litigants by *Popovich II* and *Garcia* in allowing some Title II claims and not allowing others is as serious as the conflict among the circuits. It is an invitation to a conflict within each circuit.

This case asks the same basic question presented in the petition for *certiorari* currently pending on this Court's docket in *Thompson v. Colorado*, 258 F.3d 1241 (10th Cir. 2001), *petition for cert. filed Jan. 7, 2002,* ___ U.S.L.W. ___, (2002). *Thompson*, like this petition, requests that this Court consider whether subjecting states to damage suits under Title II of the ADA is a valid exercise of Congressional authority. But this case offers a better vehicle than *Thompson* to resolve the issues as this case raises the additional question of whether a section 5 analysis should distinguish between equal protection and due process for different factual applications. Because this problematic approach is growing, *compare Garcia*, it should be resolved along with the basic Title II question presented.

The Ruling of the *En Banc* Panel Is Contrary to Recent Holdings by this Court

In recent years, this Court has considered the intersection of the Eleventh and Fourteenth Amendments to the

Constitution of the United States no less than seven (7) times. See *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Alden v. Maine*, 527 U.S. 706 (1999); *Kimel v. Florida of Regents*, 528 U.S. 62 (2000) and *Board of Trustees of the University of Ala. v. Garrett*, 531 U.S. 356 (2001).

Because the States' sovereign immunity is a vital part of our federalist system, the Court's cases properly protect the States from unintended or unjustified abrogation of this immunity by Congress. Thus, in *Atascadero State Hosp. v. Scanlon*, *supra*, the Court held that Congress can abrogate, or unilaterally override, the States' immunity only with the clearest, unambiguous statement of its intent to abrogate. In *Seminole Tribe v. Florida*, *supra*, the Court held that Congress's power to abrogate is limited to situations where Congress is empowered by § 5 of the Fourteenth Amendment to enforce constitutional rights by appropriate legislation. In *City of Boerne v. Flores*, *supra*, the Court held that a valid Congressional enactment must demonstrate a congruence and proportionality between the injury to be prevented or remedied and the means adopted to achieve that end.

Applying these principles in *Garrett*, the Court held that the Eleventh Amendment prohibits state employees from

suing their state employers for money damages under Title I of the ADA. 531 U.S. at 356. After recognizing the clear expression of Congressional intent to waive immunity contained in 42 U.S.C. § 12202, the Court determined that the remedies provided lacked congruence and proportionality to the harm to be addressed. This well reasoned conclusion was reached only after a careful and thorough review of the legislative history of the ADA.

Following the holding in *Garrett*, the *en banc* panel held that "congressional authority under the Equal Protection Clause is limited and will not sustain" Title II of the ADA "as an exception to Eleventh Amendment state immunity." However, the panel concluded that "Title II [of the ADA] ...is not controlled by the Court's decision restricting equal protection claims against the states."

The lack of an adequate legislative history to support the viability of Title II, part A of the ADA is strikingly clear. Title II, part A is grounded on the same provisions and legislative history found inadequate in *Garrett*.

In adopting Title II, part A of the ADA, Congress acknowledged the lack of a record of any pattern of conduct, let alone a pattern of constitutional deprivations by the states. In House Report No. 101-485(II), p. 146, the Congressional Budget Office's summary to Chairman Hawkins concerning the cost to the States to comply with Title II, part A's requirements of accessibility to public buildings, notes:

> H.R. 2273 would mandate that newly constructed

> state and local public buildings be made accessible to the handicapped. **All states currently mandate accessibility** in newly constructed state-owned public buildings and therefore would incur little or no costs if this bill were enacted. (Emphasis added.)

Committee Print, Legislative History of the Americans with Disabilities Act, P.L. 101-336, at 428. Title II, part A was enacted against a backdrop of virtually non-existent deprivations by the States. In the absence of a factual predicate in the congressional record, the decision of the Sixth Circuit *en banc* is contrary to the holding in *Garrett*.

A determination as to congruence and proportionality can only be accomplished with a painstaking review of legislative history. *City of Boerne v. Flores*, *supra*. It is a statute-wide determination, not to be decided case-by-case. The decision *en banc* ignores these concepts, applying a due process analysis unique to the alleged constitutional violations in the case at hand instead of an analysis of the required Congressional findings of a pattern of unconstitutional conduct by the States. The danger with this approach is the risk of inconsistent adjudications, leaving district courts with no guidelines. Even worse, district courts will be forced to select between the clear holdings in *Reickenbacker* and *Thompson* and the Sixth Circuit's contrary view in *Popovich II*.

The Validity of the Abrogation of Sovereign Immunity by Title II of the ADA Has Avoided Review by this Court

Although the Court has considered the validity of abrogation of immunity of Title I of the ADA as applied to the states, consideration of the validity of abrogation of Title II has evaded actual review. At least four (4) times the Court has had the issue before it and each time it has either declined to address the issue or the issue has otherwise escaped review.

In 1998, in determining whether inmates in state prisons were covered by Title II, the Court held that state prisons fall within the "public entity" definition of Title II of the ADA. *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206 (1998). However, this holding is not dispositive of the issue of Congressional authority to enact Title II. In its concluding paragraph, the Court expressly declined to resolve this issue because it had not been addressed by the Court of Appeals.

> We do not address another issue presented by petitioners: whether application of the ADA to state prisons is a constitutional exercise of Congress' power under ..., § 5 of the Fourteenth Amendment ....

524 U.S. at 212.

In 1999, the Court, for a second time, declined to review Title II's constitutional status. The Court considered Title II's "integration regulation," 28 C.F.R. § 35.130(d) (1998) and "reasonable-modification regulation," 28 C.F.R. § 35.130(b)(7) (1998) as applied to mentally retarded persons

institutionalized in Georgia state run facilities. *Olmstead v. L.C. Ex Rel. by Zimring*, 527 U.S. 581 (1999). The Court did not pass on the validity of Title II's regulations, noting that "[w]e recite these regulations with the caveat that we do not here determine their validity." 527 U.S. at 592.

On July 23, 1999, the *en banc* Eighth Circuit became the first court of appeals to reject the ADA's facial abrogation of Eleventh Amendment immunity, in a case arising under Title II of that Act. *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (*en banc*). On January 25, 2000, *certiorari* was granted, 528 U.S. 1146 (2000), limited to the question of:

> Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 to 12165 (1994 & Supp. III 1997), is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals.

Barely two months later, *certiorari* was dismissed by written agreement of all the parties, pursuant to Rule 46.1 of the Supreme Court of the United States. 529 U.S. 1001 (March 25, 2000).

Garrett presented the most recent opportunity for the Court to consider the validity of Title II's abrogation of soverign immunity. The question presented by the *certiorari* petition was broad enough to encompass consideration of both Title I and Title II. *Garrett*, 531 U.S. 356, n.1.

However, because no party had briefed the specific question of whether Title II is available as a statutory matter for claims of employment discrimination, the Court said,

> We are not disposed to decide the constitutional issue whether Title II, which has somewhat different remedial provisions from Title I, is appropriate legislation under § 5 of the Fourteenth Amendment when the parties have not favored us with briefing on the statutory question.

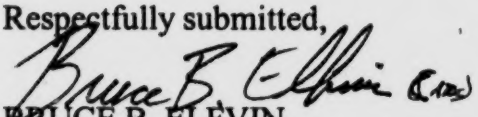
Id.

The question of whether Title II is enforceable against the states for private money damage claims is squarely presented by this petition and is ripe for review. The issue was fully briefed and argued below to the court and then re-briefed and re-argued *en banc*. Consideration of the *en banc* decision of the Sixth Circuit will provide a fully briefed opportunity for the Court to consider this important but, thus far, elusive issue of Eleventh Amendment sovereign immunity.

CONCLUSION

For these reasons, this case warrants the exercise of this Court's *certiorari* jurisdiction. The petition for a writ of *certiorari* should be granted.

Respectfully submitted,



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April, 2002

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH M. POPOVICH, Plaintiff-Appellee/Cross-Appellant,

v.

CUYAHOGA COUNTY COURT OF COMMON PLEAS, Domestic Relations Division, Defendant-Appellant/Cross-Appellee,

CUYAHOGA COUNTY, Defendant-Appellee.

Nos. 98-4100/98-4540

Appeal from the United States District Court for the Northern District of Ohio at Akron. No. 95-00684---James S. Gallas, Magistrate Judge.

Argued: June 6, 2001
Decided and Filed: January 10, 2002

Before: MARTIN, Chief Judge; MERRITT, RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, Circuit Judges

COUNSEL:

ARGUED: Bruce B. Elfvin, ELFVIN & BESSER, Cleveland, Ohio, for Appellants. Richard C. Haber, REMINGER & REMINGER CO., LPA, Cleveland, Ohio, for Appellee. **ON BRIEF:** Bruce B. Elfvin, Barbara Kaye Besser, Amy S. Glesius, for Appellants. Richard C. Haber, Brian D. Sullivan, REMINGER & REMINGER CO., LPA, Cleveland, Ohio, for Appellee. Seth M. Galanter, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Intervenor. Michael Kirkman, Sky Pettey, OHIO LEGAL RIGHTS SERVICE, Columbus, Ohio, Stephen P. Carney, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Columbus, Ohio, Richard N. Coglianese, OFFICE OF THE ATTORNEY GENERAL, EMPLOYMENT LAW SECTION, Columbus, Ohio, Mary M. Collier, ASSISTANT ATTORNEY GENERAL, Nashville, Tennessee, Michael E. Moore, TENNESSEE ATTORNEY GENERAL'S OFFICE, Nashville, Tennessee, for Amici Curiae.

MERRITT, J., delivered the opinion of the court, in which seven of the thirteen judges of the court joined in Sections II and III and in the judgment of the court reversing the judgment of the district court and remanding for a new trial; namely, MARTIN, C. J., MERRITT, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN. Six judges, RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, and

BATCHELDER, would reverse the judgment of the district court and dismiss the case. MARTIN, C. J., MERRITT, RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, and BATCHELDER, JJ., concur in Section I of Judge Merritt's opinion for the court. MOORE, J., delivered a separate concurring opinion, in which DAUGHTREY, COLE, CLAY, and GILMAN, JJ., joined. RYAN, J., delivered a separate opinion concurring in part and dissenting in part, in which BOGGS, NORRIS, SUHRHEINRICH, SILER, and BATCHELDER, JJ., joined. GILMAN, J., delivered a separate opinion concurring in the judgment and dissenting from the composition of the *en banc* court.

OPINION

MERRITT, Circuit Judge. The state sovereign immunity provision of the Eleventh Amendment, ratified in 1795 to overrule **Chisholm v. Georgia**, 2 U.S. (2 Dall.) 419, 1 L. Ed. 440 (1793), prohibits Congress from directing the federal courts to hear suits by citizens against a state or its executive, legislative or judicial departments.[1] On the other hand, the

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[1]The Eleventh Amendment provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of

Fourteenth Amendment in Section 5, ratified 73 years later, partially abrogates this state immunity from suit in federal courts by giving Congress the "power to enforce [Section 1 of the Amendment] by appropriate legislation," including the creation of federal causes of action against states in federal court.[2] How exactly to reconcile these two conflicting provisions has in recent years divided constitutional scholars,

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any Foreign State.

Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996), gives a brief history of its interpretation.

[2] The pertinent provisions of the Fourteenth Amendment are as follows:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

....

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

the federal courts, and the Supreme Court.[3] This appeal to the *en banc* court asks us to examine further the relationship between these two constitutional amendments. The case arises under *Title II* of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, which provides that "no qualified individual with a disability shall, by reason of such disability, *be excluded from participation* in or be denied the benefits of the *services, programs, or activities of a public entity*, or be subjected to discrimination by any such entity" (emphasis added). The statute does not define "excluded from participation" or "discrimination." Here, a hearing-impaired person brought an action in federal court under Title II against a state court for allegedly failing to provide him with adequate hearing assistance in his child custody case. He obtained a jury verdict in the district court below against the state court for $400,000 in compensatory damages based on an equal protection-type claim of discrimination, a due process-type claim of unreasonable exclusion from participation in the custody proceeding, and a claim of retaliation for filing an administrative complaint for failing to accommodate his

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[3] Laurence H. Tribe, *American Constitutional Law* § 5-16 (3d ed. 2000); Evan H. Caminker, *Symposium: Shifting The Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity: "Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 Stan. L. Rev. 1127 (2001).

disability. The state has asserted it is immune from this suit under the Eleventh Amendment. The questions before us are whether Congress in Title II of the Disabilities Act has validly abrogated the state court's Eleventh Amendment immunity from suit; and, if so, whether the plaintiff has a valid case under the Act. We conclude that the plaintiff's action is barred by the Eleventh Amendment in so far as the action relies on congressional enforcement of the Equal Protection Clause, but it is not barred in so far as it relies on congressional enforcement of the Due Process Clause. As applied to the plaintiff's cause of action, Title II is "appropriate legislation" under section 5 and the Due Process Clause of section 1 of the Fourteenth Amendment. We also conclude that, on the facts, the $400,000 verdict below must be set aside and the case remanded for a new trial under the Disabilities Act.

I. Enforcement of The Equal Protection Clause

The original three judge panel in this case agreed with the state's equal protection argument that it was immune from plaintiff's suit under the Eleventh Amendment, and the Court dismissed the suit without reaching the merits. Judge Ryan's opinion for the Court concluded that Congress had improperly expanded the Equal Protection Clause by imposing "heightened scrutiny" in disability cases when it only requires "rational basis" scrutiny. The Court said that "[i]t is well established that disability is not a suspect class for purposes of equal protection analysis" and so "the State may

discriminate on the basis of disability if such classification is rationally related to a legitimate state interest." *Popovich v. Cuyahoga County Court of Common Pleas, Domestic Relations Div.*, 227 F.3d 627, 637 (6th Cir. 2000). The panel did not reach any question concerning whether Congress had authority under the Due Process Clause to require accommodation of the disabled in state child custody proceedings.

On December 12, 2000, we elected to rehear this case *en banc*, but delayed consideration until the Supreme Court announced its decision in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, decided February 21, 2001. In June of 2001, the *en banc* court heard oral argument. In *Garrett*, the Supreme Court, 5 to 4, held that the Eleventh Amendment bars federal employment discrimination suits against a state based on disability, as authorized by *Title I* of the Americans with Disabilities Act. The Court, noting that the *Title I* legislation is limited to employment discrimination against the disabled, said that "the scope of the constitutional right at issue" is simply "equal protection." *Id.* at 963. Title I does not encompass claims based on substantive rights under the Due Process Clause, and therefore the scope of the constitutional right Congress is enforcing does not go beyond equal protection liability. The Court then held that Section 5 of the Fourteenth Amendment does not give Congress the power to enforce the Equal Protection Clause by authorizing federal employment

discrimination suits against states based purely on *disability*. Like Judge Ryan's opinion for the panel in this case, the Court reasoned that under equal protection principles, disability -- unlike race -- is not a "suspect category" and does not deserve "heightened scrutiny." Therefore, States may make reasonable employment decisions on the basis of disability. Title I of the Disabilities Act, which addresses discrimination in employment based on disability, may only trigger "minimum rational-basis review," *id.*, and Congress may not enforce the Equal Protection Clause by creating a higher standard of liability and enforcing it against the states in federal court. Sovereign immunity under the Eleventh Amendment forbids heightened state liability in federal courts in disability claims because such claims have never before received more constitutional protection than rational basis review. The Court held that Title I is not "congruent" with the Equal Protection Clause because it greatly expands "discrimination" liability by adding a very large new suspect class of plaintiffs. *Id.* at 967-68. Thus the Supreme Court followed the same line of reasoning constraining congressional enforcement of the Equal Protection Clause as the panel of this Court suggested in its opinion in this case. It is clear after *Garrett* that congressional authority under section 5 to enforce the Equal Protection Clause is limited and will not sustain the Disabilities Act as an exception to Eleventh Amendment state

immunity.[4]

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[4] Judge Moore, who concurs in our opinion on due process but not equal protection, states quite clearly in her concurring opinion the problem with upholding Title II on equal protection grounds:

> I recognize that a subset of discriminatory state action may be rational under the Constitution but unreasonable under Title II. In other words, Title II may 'prohibit conduct which is not itself unconstitutional and intrude into legislative spheres of autonomy previously reserved to the states.' *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997)...

But Judge Moore then concludes:

> However, this possibility does not necessarily mean that Title II exceeds Congress's enforcement power under Section 5 of the Fourteenth Amendment. The Supreme Court has instructed that Congress may enact 'reasonably prophylactic legislation' when faced with 'difficult and intractable problems [,which] often require powerful remedies.' *Kimmel v. Florida Bd. of Regents*, 528 U.S. 62, 88 (2000). In enacting the ADA, Congress noted that discrimination against individuals with disabilities was 'a serious and pervasive problem,' 42 U.S.C. § 12101(a)(2).

Judge Moore's position applies to Title II the

II. Title II Appropriately Enforces The Due Process Clause

The Supreme Court indicated, however, that *Title II* of the Disabilities Act is different from Title I. Although the Court had granted certiorari to consider the appropriateness of Title II as an exception to Eleventh Amendment immunity, the majority in *Garrett* reserved judgment on the validity of Title II under Section 5. It concluded that Title II, dealing with "services, programs, or activities of a public entity,"

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reasoning of Justice Breyer's dissenting opinion in *Garrett*. But the problem in following this line of argument is that the majority of the Supreme Court in *Garrett* seems to have rejected this position in rejecting Justice Breyer's dissenting viewpoint. Rather, the majority of the Supreme Court appears to have established a clear rule that disability discrimination deserves only rational basis review and that Congress may not go beyond this standard under the Equal Protection Clause by imposing new liabilities on the states. This *Garrett* rule would appear to apply to both Title I and Title II, although the Court has not made this holding explicit as to Title II, and it is possible, though unlikely, that a majority of the Supreme Court might distinguish *Garrett* along the lines Judge Moore proposes in her concurring opinion.

rather than employment, "has somewhat different remedial provisions from Title I" and is not controlled by the Court's decision restricting equal protection claims against states. *Id.* at 960 n.1. Title II, unlike Title I, encompasses various due process-type claims with varying standards of liability and is not limited to equal protection claims. In addition to briefly noting differences between the two titles, the Court in *Garrett* also noted that Section 5 allows Congress to prohibit a "broader swath of conduct" than the courts have themselves identified as unconstitutional. *Id.* at 963.

In *Garrett*, the Supreme Court advised the lower federal courts that "the first step" in reconciling the Eleventh Amendment with legislation adopted under Section 5 is "to identify with some precision the scope of the constitutional right at issue" that Congress is "enforcing," and to define the "metes and bounds" of that particular right." *Id.* at 963-64. Obviously, standards of constitutional liability differ depending on the nature of the constitutional right in question. In the case before us, the essential constitutional right sounds most clearly not in equal protection but in due process. The general claim is that the state court in a child custody proceeding denied the partially deaf plaintiff a reasonable way to participate meaningfully in the proceeding so that he could assert his child custody rights. He was, he claims, "excluded from participation in" the proceeding -- to use the precise words of Title II. In defining the "metes and bounds" of the

constitutional right before us, we must consider whether plaintiff's due process-type claim to participate fully in the hearing in his child custody suit is an exception to Eleventh Amendment immunity.

The Supreme Court has recognized the special nature of parental rights and has consequently imposed special due process guarantees so that states may not lightly terminate parents' relationships with their children. The procedural guarantees that the Court has previously had an occasion to discuss include the requirements that states provide indigent parents with court-appointed counsel during certain parental rights hearings, *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 30 (1981) (noting that courts have "generally held that the State must appoint counsel for indigent parents at termination proceedings"); utilize a "clear and convincing" evidentiary standard when considering the termination of parental rights, *Santosky v. Kramer*, 455 U.S. 745, 769-70 (1982); and provide indigent parents, free of charge, with the trial records necessary for proper consideration of appeals challenging termination of their parental authority, *M.L.B. v. S.L.J.*, 519 U.S. 102, 128 (1996). *Cf. Little v. Streater*, 452 U.S. 1 (1981) (striking down Connecticut's requirement that indigent defendants bear the cost of paternity tests if taken at the indigent's request). In fact, although the Court has issued a number of divided opinions in deciding these questions, it has unanimously agreed that "the interest of parents in their

relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment." *Santosky*, 455 U.S. at 774 (Rehnquist, J., dissenting).

In *Lassiter*, the Court said that state termination or alteration of parental rights requires procedural safeguards under the Due Process Clause in order to insure "the accuracy and [justice] of the decision," 452 U.S. at 27, and in order to avoid "the risk that a parent will be erroneously deprived of his or her child." *Id.* at 28. Thus the appointment of counsel for indigent parents may be required in complex judicial proceedings that may include the need for "[e]xpert medical and psychiatric testimony, which few parents are equipped to understand." *Id.* at 30. *Lassiter* makes it clear that in analyzing the safeguards needed in child custody proceedings, the Due Process Clause requires a balancing of "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." *Id.* at 27. This broad balancing standard under due process -- unlike the flat rule giving only rational basis analysis under equal protection in disability matters -- is open to interpretation by Congress as well as the courts, for otherwise the Court's admonition in *Garrett* that Congress may seek to deter a "broader swath of conduct than the courts have themselves identified as unconstitutional" would have no real meaning or effect. Otherwise the "congruence" required between a piece

of Section 5 legislation and the specific constitutional provision enforced by the legislation would mean that Congress may only provide remedies to enforce a specific court decision. This would effectively usurp congressional authority to pass "appropriate" legislation and would give less deference to Congress than courts ordinarily give to administrative agencies in interpreting statutes.

The institutional role of Congress under Section 5 in interpreting the Fourteenth Amendment should be no less expansive than the role of the courts in interpreting statutes at common law. Congress should have at least the same power as Lord Coke described for judges in interpreting statutes in 1628:

> a construction made by the judges, that cases out of the letter of a statute, yet being within the same mischiefe, or cause of the making of the same, shall be within the same remedie that the statute provideth; and the reason hereof is, that for the lawmakers could not possibly set downe all cases in expresse terms.[5]

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[5]Sir Edward Coke, The First Part of the Institutes of the Laws of England § 21, at 24.b (Philadelphia, Robert H Small 1853) (1628).

Judges must adjudicate one case at a time and usually do not go beyond the case at hand to anticipate or rule on other fact patterns that may fall "within the same mischiefe." Law making for future cases with different fact patterns is usually the role of the legislator, not the role of courts in a single decision on a single set of facts after a courtroom battle by adversaries. Therefore, the courts should not tie the hands of Congress under Section 5 merely to the implementation of previous court decisions. Congress should have under Section 5 at least the power that common law judges possess to enforce "the equity of the statute," as described by Lord Coke.[6]

Here the plaintiff's due process interest is significant in that the judicial proceeding will determine the amount of time, if any, he can spend with his daughter. Failure to accommodate his hearing disability may render him unable to participate meaningfully in that determination. If he cannot understand what is happening during the custody hearing, it will be impossible for him to refute claims made against him, or to offer evidence on his own behalf. Consequently, a state's

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[6]*See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV.1 (2001); William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation*, 1776-1806, 101 COLUM. L. REV. 990 (2001).

failure to accommodate plaintiff's deafness may greatly increase the risk of error in the proceeding, precluding one side from responding to charges made by the opposing party, an essential element of our adversary system. From Ohio's perspective, the paramount governmental interest is to insure that the State's most vulnerable citizens are placed with the parent best suited for providing for their welfare. This interest is achieved through a proceeding that permits both parents to understand and to respond to the arguments made by their adversaries, thereby giving the judge a complete picture of each parent's abilities to care for the child in question. At the same time, Ohio has an obvious need to administer its decisions in a cost-conscious and time-effective manner, and at some point the requested accommodations may become so expensive or onerous as to outweigh their usefulness in reaching a decision.

In legislating on the subject of disability, Congress may require states in child custody proceedings to consider (1) the "vital" and "fundamental" nature of the rights at stake in parental custody hearings, *Santosky*, 455 U.S. at 753, (2) the fact that costs of supplying the requested accommodation are fairly low, and (3) that parties may be virtually "excluded from participation in" the state proceeding unless adjustments are made to accommodate the party's disability. The subject matter involved in the instant case -- a father seeking to force the state to provide him with hearing assistance for use in a

state judicial proceeding determining his custody rights with respect to his daughter -- raises obvious due process concerns which Congress has the authority to address under Section 5. Based on the Supreme Court cases concerning the process required in child custody suits, it is clear that Ohio is required to provide Popovich with some level of hearing assistance, depending on the degree of his disability, for his daughter's custody hearing and may not retaliate against him for making such a request. As applied to the case before us, the "participation" requirement of Title II serves to protect Popovich's due process right to a meaningful hearing. In child custody cases involving hearing-impaired parents, Congress is well within its express authority under Section 5 to require states to accommodate parental disability and to refrain from retaliation, for Congress is "enforcing" the due process right rather than "expanding" it. There is no separation of powers problem here, as in *Garrett*, where Congress, according to the view of the majority, failed to observe a clear rule of equal protection law. Congress has not changed the nature of the due process right or watered down the constitutional standard. The congressional "exclude from participation" standard, as applied here, certainly does not prohibit a "broader swath of [state judicial] conduct" than the Supreme Court suggests is within the congressional power under Section 5.

III. The Merits of Plaintiff's Claims under the Disabilities Act

This case, which resulted in a $400,000 damage award for plaintiff, was tried in the district court on three basic theories: (1) retaliation by the state domestic relations court against plaintiff for requesting hearing assistance and then filing an administrative complaint with the Department of Justice under the Disabilities Act in violation of 42 U.S.C. §12203;[7] (2) exclusion from participation in the custody case

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[7]42 U.S.C. § 12203, Prohibition against retaliation and coercion under the ADA, states in relevant part:

> (a) Retaliation
>
> No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter, or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.
>
> (b) Interference, coercion, intimidation
>
> It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

because of plaintiff's disability; and (3) discrimination against plaintiff by denying him -- in the language of the district court's jury charge -- "an equal opportunity . . . to enjoy the benefits of a service conducted by the public entity [the state court]" and "the opportunity to participate equally in the proceeding pending before the court." *Popovich v. Cuyahoga County*, No. 98-4100 (N.D. Ohio), charge to jury, April 3, 1998, trial transcript at 770.

We reverse and remand the case for a new trial because the charge to the jury appears to permit the jury to find in favor of the plaintiff if it finds discrimination against him or exclusion from public proceedings based on equal protection principles. After *Garrett*, this is an impermissible basis on which to base federal jurisdiction under the Eleventh Amendment or a verdict and damages against a state court under the Disabilities Act. *Garrett*, however, does not foreclose a trial and verdict based on retaliation or unreasonable exclusion from judicial proceedings based on disability in a due process-type claim. We believe that the facts presented in the court below raise jury issues on the retaliation and exclusion claims.

The trial in the district court that resulted in the $400,000 damage award consisted of ten witnesses presented over four days. Much of the testimony described plaintiff's custody dispute over his daughter and the initial *ex parte*

hearing in August 1992 that led to a state court order transferring custody of his daughter to her mother. This testimony about the custody dispute and the initial *ex parte* hearing is relevant only to the extent that it provides the context or background in which the facts concerning retaliation and exclusion were presented. On the retaliation claim, Mr. Thomas Kondzer, plaintiff's lawyer during the custody dispute and hearings held in 1992, testified that his client was presented with an "option" in December of 1992 by the presiding judge of the custody proceeding that required plaintiff to either give up his rights under the Disabilities Act or suffer a delay in the adjudication of the custody case. Testimony of Thomas Kondzer, Mar. 31, 1998, trial transcript at 173. Mr. Kondzer testified that the waiver "wasn't a waiver for that day. It was a total waiver." *Id.* at 243. According to Mr. Kondzer "the option was to withdraw the motion [for closed-captioning or real time transcription], waive your rights under the ADA and proceed today" or have the proceeding postponed. *Id.* With Mr. Kondzer's advice, the plaintiff refused to waive his Disabilities Act claim or withdraw his motion. After his refusal, the hearing was then discontinued and did not resume again until the fall of 1994, over a year and a half later. In fact, the parties stipulated in the court below that the judge presiding over the custody proceeding "gave the plaintiff two options. Plaintiff could withdraw his motion for a hearing accommodation and the court could proceed today, 'with the continued hearing' or [the

judge] could, 'schedule a hearing to determine the extent of his hearing disability and what if any accommodation needed to be made for that'." Stipulated Facts of the Parties, Apr. 1, 1998, trial transcript at 390-91. The long delay in the proceedings then ensued.

At a pretrial conference held on February 2, 1995, the new judge assigned to the case presented plaintiff with a proposed stipulated order in which one of the provisions was that plaintiff would agree to waive any objection to or appeal of "this proceeding" and "any prior proceedings on the basis of Joseph Popovich's hearing disability." Def. Ex. B-5; Testimony of Judge Anthony Russo, Apr. 2, 1998, trial transcript at 439. Again, plaintiff, with the advice of his attorney, refused to sign the proposed order.

These facts raise a viable jury issue of retaliation. The jury, based upon these facts, would be entitled to find that forcing Popovich to choose between going forward with the custody hearings and waiving his disability claim -- and then upon his refusal to waive, discontinuing the proceedings for a year and a half -- could constitute retaliation in violation of § 12203.

These same facts concerning the long delay in the custody case based on plaintiff's refusal to waive his disability claims, plus the claimed refusal of the state court to provide

plaintiff with closed captioned translation of the proceeding, or other forms of hearing assistance, may constitute an unreasonable exclusion of plaintiff from participation in the proceeding under principles of due process of law. The case may be retried on both theories of liability under the Disabilities Act.[8]

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[8]In response to Judge Ryan's dissenting opinion complaining that the *en banc* court should not reach the Due Process Clause theory for upholding Title II, we should point out that until the grant of *en banc* rehearing no party had a reasonable opportunity to advance this argument. In the District Court, no party advanced an Eleventh Amendment immunity argument barring this action, and therefore no party was called upon to advance any justification for Title II based on equal protection or due process under Section 5 of the Fourteenth Amendment. Before the original panel, the State as appellant advanced no argument based on the Eleventh Amendment in its original brief and only mentioned in its last reply brief. The State's immunity argument before the original panel was based only on an equal protection argument. The panel accepted the State's equal protection theory and dismissed plaintiff's action even though the State waived any such argument by not raising it in the trial court or in its original brief.

Once the Civil Rights Division of the Justice Department learned that Title II was under constitutional attack before the original panel, it sought to intervene under 28 U.S.C. § 2403(a). Even though § 2403(a) grants the government a right to intervene when the constitutionality of

Hence, the plaintiff's claims based on equal protection type principles of discrimination are foreclosed, as stated above, and the jury verdict of $400,000 is set aside and the case remanded for retrial on the retaliation and unreasonable exclusion from participation claims.

CONCURRENCE

KAREN NELSON MOORE, Circuit Judge, concurring. I concur in the judgment of the court and Part II of the majority opinion, but I write separately with respect to

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a federal statute is attacked (the Court "shall permit the United States to intervene . . . for argument on the question of constitutionality"), the panel issued a one-line order denying intervention. Thus the panel prevented the government from making any argument and reached its conclusion in the absence of any argument based on the Due Process Clause. The *en banc* court allowed the government to intervene, and it then filed a brief raising the due process justification for upholding Title II in this case. Moreover, Mr. Michael Kirkman of the Ohio Legal Rights Service filed an extensive amicus brief supporting the government's due process justification for Title II. We therefore believe it appropriate to reach the due process basis for upholding Title II. It is not the fault of the *en banc* Court, or the government, that the original panel chose to ignore the Due Process Clause as a basis for Title II.

Part I. The court relies on the Supreme Court's holding in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), that state employees may not recover money damages for the state's failure to comply with Title I of the Americans with Disabilities Act ("ADA") to foreclose equal protection claims for money damages against the state under Title II of the ADA. I believe that *Garrett* does not control this court's disposition of this case. Moreover, I would conclude, based on the significant differences between Titles I and II, that Congress validly enacted the latter pursuant to its enforcement authority under § 5 of the Fourteenth Amendment to remedy or to prevent violations of both the Due Process and Equal Protection Clauses.

Although classifications based on disability are not subject to heightened scrutiny, the Supreme Court has recognized that the Equal Protection Clause prohibits arbitrary and invidious discrimination against individuals with disabilities. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985) (holding that "the [disabled], like others, have and retain their substantive constitutional rights in addition to the right to be treated equally by the law"). As correctly noted in Part I of the majority opinion, the Supreme Court held in *Garrett* that Congress had exceeded its § 5 enforcement authority in abrogating state sovereign immunity from suits for money damages under Title I of the ADA. 531 U.S. at 374. In so holding, the *Garrett* Court observed that the

legislative record of the ADA "fails to show that Congress did in fact identify a pattern of irrational state discrimination in *employment* against the disabled." *Id.* at 368 (emphasis added). However, the Court expressly reserved the question whether Title II of the ADA was appropriate legislation under § 5 of the Fourteenth Amendment. *Id.* at 360 n.1.[1] Because *Garrett* did not address whether Congress identified a history and pattern of unconstitutional discrimination by the states against persons with disabilities in *the provision of public services*, I would not read the decision to be determinative in the context of Title II.[2] Rather than rely on authority that is at

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[1]Indeed, the *Garrett* Court acknowledged that "[t]he overwhelming majority of [the hundreds of accounts compiled by Justice Breyer in his dissent] pertain to alleged discrimination by the States in the provision of public services and public accommodations, which areas are addressed in Titles II and III of the ADA." 531 U.S. at 371 n.7.

[2]*Cf. Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn*, ___ F.3d ___, 2001 WL 1159970, at *9 (2d Cir. Sept. 26, 2001) (holding that Title II actions for money damages may be brought by plaintiffs who can "establish that the Title II violation was motivated by discriminatory animus or ill will based on the plaintiff's disability"); *see also Thompson v. Colorado*, 258 F.3d 1241, 1249, 1255 (10th Cir. 2001) (stating, post-*Garrett*, that "this court now writes on a clean slate in addressing whether Title II of the ADA is a valid abrogation of the states' Eleventh Amendment immunity" and holding that it is not).

best merely implied, I would analyze the constitutionality of Title II on its own merits.

In rejecting the equal protection claim in this case, the court discounts the significant differences between Titles I and II of the ADA. First, Congress made express findings, based on an extensive study and record,[3] of a pattern of

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I also find instructive the procedural history of *Dare v. California*, 191 F.3d 1167 (9th Cir. 1999), *cert. denied*, 525 U.S. 819 (2001), in which a divided panel of the Ninth Circuit noted that "Congress made extensive factual findings regarding the widespread arbitrary and invidious discrimination which disabled people face" and held that Congress validly abrogated state sovereign immunity pursuant to its Fourteenth Amendment powers in enacting Title II of the ADA. *Id.* at 1175. The Supreme Court's denial of certiorari in *Dare* came a week after the Court announced *Garrett*.

[3]Congress itself held no less than thirteen hearings; it also created the Task Force on the Rights and Empowerment of Americans with Disabilities ("Task Force"), which held sixty-three public forums in every state that were attended by thousands of people. *Garrett*, 531 U.S. at 377-78 (Breyer, J., dissenting). The Task Force eventually submitted "several thousand documents" that evidenced "massive discrimination and segregation in all aspects of life" and "the most extreme isolation, unemployment, poverty, psychological abuse and physical deprivation experienced by any segment of our society." 2 STAFF OF HOUSE COMM. ON EDUC. AND LABOR,

unconstitutional discrimination by the states against individuals with disabilities in the areas covered by Title II.[4] These findings appear in the text of the statute itself, where Congress specifically noted that "discrimination against individuals with disabilities persists in such critical areas as . . . education . . . institutionalization . . . voting, and access to public services." 42 U.S.C. § 12101(a)(3). The findings also appear in the legislative history of Title II. H.R. REP. NO. 101-485, pt. 2, at 28-29 (1990); S. REP. NO. 101-116, at 6 (1989).[5]

101ST CONG., LEGISLATIVE HISTORY OF PUB. L. NO. 101-336: THE AMERICANS WITH DISABILITIES ACT 1324-25 (Comm. Print 1990) ("2 LEGIS. HIST.").

[4]In contrast, the *Garrett* Court emphasized that Congress had mentioned the private sector -- but not the states -- in its legislative findings about employment discrimination against persons with disabilities. 531 U.S. at 371-72.

[5]Furthermore, the caselaw contains some evidence of "extensive litigation and discussion of the constitutional violations," *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring), in the provision of public services to the disabled. *See, e.g.*, *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1243, 1248 (6th Cir. 1989) (fifteen paraplegics received "deplorable treatment" at a county jail -- they were not bathed for several days and forced to remain in their human waste), *cert. denied*, 495 U.S. 932 (1990); *Philadelphia Police & Fire Ass'n for Handicapped Children, Inc. v. City of Philadelphia*, 874 F.2d 156, 158 (3d Cir. 1989) (city and state did not violate the Fourteenth Amendment in reducing or eliminating

The fact that Title II implicates constitutional violations in areas ranging from education to voting also suggests that heightened judicial scrutiny under both the Due Process and Equal Protection Clauses is appropriate. Title II's general mandate covers all "of the services, programs, or activities of a public entity." 42 U.S.C. § 12132. In this case, which involves the right of a hearing-impaired person to have adequate hearing assistance in a child custody proceeding, the court concludes that "the essential constitutional right sounds most clearly not in equal protection but in due process." Maj. op. at 8. However, in finding widespread unconstitutional discrimination against persons with disabilities, Congress

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services to mentally retarded persons living at home); *LaFaut v. Smith*, 834 F.2d 389, 392-94 (4th Cir. 1987) (paraplegic inmate was denied adequate toilet facilities for three months and necessary physical therapy); *Gallagher v. Pontiac Sch. Dist.*, 807 F.2d 75, 78-79 (6th Cir. 1986) (schools did not violate the Fourteenth Amendment by failing to provide "*additional* special services" to a deaf and mentally handicapped student who was enrolled in special education programs); *Parrish v. Johnson*, 800 F.2d 600, 603, 605 (6th Cir. 1986) (prison guard repeatedly assaulted two paraplegic inmates with a knife, caused them to sit in their own feces, and taunted them with remarks like "crippled bastard"); *cf. Pushkin v. Regents of Univ. of Colorado*, 658 F.2d 1372, 1376 (10th Cir. 1981) (doctor alleged that state university excluded him from its Psychiatric Residency Program in violation of the Rehabilitation Act because he suffered from multiple sclerosis).

heard extensive testimony not only about the states' failure to make courtrooms accessible to all persons but also about the states' discrimination against the disabled in areas such as voting[6] and education,[7] which clearly implicate the Equal Protection Clause.

Finally, I believe, given the extensive record of constitutional violations in the states' provision of public services to persons with disabilities, that Title II is a more congruent and proportional remedy than Title I. Although Title II does require the states to take some affirmative steps to ensure that the disabled have access to governmental

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[6]*See, e.g.*, S. REP. NO. 101-116, at 12 (citing testimony about state discrimination in making polling places accessible to the disabled and forcing votes by absentee ballot before candidates participated in key debates); 2 LEGIS. HIST. 1219-20 (the chairperson of the Rhode Island Governor's Commission on the Handicapped testified about impediments to a disabled individual's ability to register as a voter and to vote).

[7]*See, e.g.*, S. REP. NO. 101-116, at 7 (finding illustrative the testimony of a paraplegic who "was promptly refused admission [to the local public school] because the principal ruled that [she] was a fire hazard" due to her wheelchair); 2 LEGIS. HIST. 1224 (a legally blind student at the State University of New York "had to drop a required theory course because [she] was unable to read the photo-reduced score of a Bach cantata").

programs, it targets discrimination that is unreasonable. Title II requires reasonable modifications only when a disabled individual is otherwise eligible for a public service and the modifications would not fundamentally alter the nature of the service. The states therefore maintain their discretion over the provision of public services so long as they do not arbitrarily discriminate against the disabled. I recognize that a subset of discriminatory state action may be rational under the Constitution but unreasonable under Title II. In other words, Title II may "prohibit[] conduct which is not itself unconstitutional and intrude[] into 'legislative spheres of autonomy previously reserved to the States.'" *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)). However, this possibility does not necessarily mean that Title II exceeds Congress's enforcement power under § 5 of the Fourteenth Amendment. The Supreme Court has instructed that Congress may enact "reasonably prophylactic legislation" when faced with "[d]ifficult and intractable problems[, which] often require powerful remedies." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 88 (2000). In enacting the ADA, Congress noted that discrimination against individuals with disabilities was "a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). The record indicates that the states have discriminated against the disabled in many aspects of governmental operations and that they may continue to do so. Confronted with this record of unconstitutional treatment, I

conclude that the accommodations that Title II requires are necessary to fulfill Congress's purpose "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1).

For the foregoing reasons, I would hold that the Eleventh Amendment does not bar Title II actions for money damages against the states based on violations of the Equal Protection Clause.

CONCURRING IN PART, DISSENTING IN PART

RYAN, Circuit Judge, concurring in part, and dissenting in part. I concur entirely in the majority's conclusion that Congress did not validly abrogate the states' Eleventh Amendment immunity when, under Title II of the ADA, it attempted to enforce the Equal Protection Clause. But, as I shall explain, I strongly disagree that, in enacting Title II, Congress validly abrogated states' immunity from alleged due process violations of the kind plaintiff has brought. Just as Congress did not validly exercise its constitutional authority under § 5 of the Fourteenth Amendment when it sought, in Title II, to override states' Eleventh Amendment immunity from equal protection claims,

it likewise failed to do so with respect to due process claims.

I.

Joseph M. Popovich filed a complaint in 1995 alleging that the Domestic Relations Division of the Cuyahoga County Court of Common Pleas (DRD) discriminated against him in violation of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-12134. Popovich also argued that the DRD retaliated against him after he filed a discrimination charge against the court with the United States Department of Justice.

Popovich, who suffers from partial hearing loss, claimed that the DRD violated Title II when it refused to provide him with real-time captioning services during custody hearings concerning his daughter. He further claimed that the DRD's effort to accommodate him by providing an FM amplification system was not reasonable because the system's headphones had given him an ear infection. Popovich also complained of numerous procedural delays which caused the hearings to drag on over four years. The delays were caused by the combination of a temporary restraining order against Popovich on motion by his ex-wife, a referee's illness, motions regarding Popovich's hearing accommodation, and unexplained scheduling delays.

Following a jury trial, Popovich was awarded

$400,000 in compensatory damages. The DRD filed post-trial motions, which, with one exception, were rejected. The DRD then appealed to this court.

In its appeal, the DRD advanced arguments based on judicial immunity and the insufficiency of the lower court's findings. Popovich responded to each of those arguments in turn. Only in the DRD's reply brief was the issue of its Eleventh Amendment immunity raised. In light of the obvious importance of the Eleventh Amendment issue and the split in circuit authority, the panelists thought this abbreviated, afterthought reference to the Eleventh Amendment immunity defense was troublesome, particularly since the principle of state sovereignty that the Eleventh Amendment codifies directs us to consider carefully legislative actions that curb its protections. To assist our effort to reach an informed decision on the matter and provide the parties a fair hearing, we, the original panelists, directed the parties to submit letter briefs specifically addressing Eleventh Amendment immunity and the ADA. We did so after satisfying ourselves that it is well settled that Eleventh Amendment state sovereign immunity could properly be raised for the first time on appeal. *Popovich v. Cuyahoga County*, 227 F.3d 627, 631-33 (6th Cir. 2000).

The parties argued that Congress's abrogation of Eleventh Amendment immunity rested on congressional protection of the Fourteenth Amendment's equal protection

principle. Neither party suggested that Congress acted to enforce any due process protection. In light of the argument before the court, and mindful that federal courts are forbidden to issue advisory opinions, U.S. Const. art. III, § 2, cl. 1; *see Morrison v. Olson*, 487 U.S. 654, 677 (1988), we rested our decision on the equal protection argument.

We held that equal protection was not a constitutionally sufficient basis on which to rest the ADA's abrogation of Eleventh Amendment immunity, reasoning that since government classifications involving disabled individuals receive rational review, the ADA prohibited a much broader swath of conduct than did the Fourteenth Amendment's Equal Protection Clause. The equal protection reasoning of our decision was ultimately approved and adopted by the Supreme Court in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), in which the Court held that Congress did not validly abrogate states' Eleventh Amendment immunity when it passed Title I of the ADA.

Popovich moved for rehearing and a majority of this court's active members agreed to rehear the case *en banc*. In the interim, the Department of Justice intervened on behalf of Popovich and an *amicus* brief was submitted on his behalf by the Ohio Legal Rights Service (OLRS). Oddly, by the time the petition for rehearing *en banc* was granted, a new ADA theory

was being advanced, not by Popovich, but by the *amicus* and the intervenor. Later, at the *en banc* hearing, some members of the court inquired of counsel concerning the novel and unbriefed "due process-type" theory, even though the parties had not argued it. As a result, much of the argument before the *en banc* court differed markedly from the equal protection theory the parties had briefed and argued before the original panel and had again briefed and attempted to argue before the *en banc* court. Nevertheless, at what surely will come as a surprise to the parties, the majority, unbidden, save for the urging of an *amicus* and an intervenor, finds that it is through enforcement of the Due Process Clause of the Fourteenth Amendment, and not, as the parties thought, the Equal Protection Clause, that Congress has successfully abrogated the states' Eleventh Amendment immunity.

II.

It is troubling, to put it mildly, that the strongest advocacy for the theory that the Due Process Clause of the Fourteenth Amendment provides special protection for parents in custody or termination proceedings came from one of the members of the court at oral argument, not the parties, and has now become the basis for the court's judgment in this case.

Since the due process theory is a court-conjured rationale for denying Ohio Eleventh Amendment immunity,

it is appropriate to ask whether the court should, upon *en banc* rehearing, address the due process theory of ADA abrogation at all. The members of the court are almost evenly divided on the critically important issue we are deciding: whether, in Title II, Congress has validly overridden the states' Eleventh Amendment immunity. The issue is novel. There is not a single appellate case on point in this circuit or elsewhere. Certainly, there is considerable interest in addressing the majority's novel due process issue, but, in my view, the proper case for doing that is one in which the issue is addressed and decided in the lower court--ours, after all, is a reviewing court--and then fully briefed and argued here. I object strongly to the majority's decision to invent for the plaintiff a theory of recovery he did not raise, brief, or argue, and to which the defendant has not had a suitable opportunity to respond.

This disapproval is not merely a matter of personal preference; it is, as I shall demonstrate, a position well supported by the appellate rules of practice and this court's precedent.

A.

1.

En banc proceedings are governed by Fed. R. App. P. 35, which states, in pertinent part:

> An en banc hearing or rehearing is *not favored* and ordinarily will not be ordered unless:
>
> **(1)** en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
>
> **(2)** the proceeding involves a question of exceptional importance.

Fed. R. App. P. 35(a) (emphasis added). This clear language cautions courts to exercise *en banc* review with circumspection. The Sixth Circuit has expounded further upon this rule:

> A suggestion for rehearing en banc is an *extraordinary procedure* which is intended to bring to the attention of the entire Court *a precedent-setting error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court or Sixth Circuit precedent.*

6th Cir. R. 35(c) (emphasis added). In the matter before us there is *no* precedent-setting error and there is *no* conflict with prior precedent. Indeed, in *Garrett*, the Supreme Court affirmed the reasoning of this court's original panel. That should dispose conclusively of the matter. The only reason

there is any uncertainty in this case is because at oral argument, one or two members of this court manufactured confusion. The equal protection theory of ADA abrogation--the argument advanced by Popovich--failed. That avenue of reversal foreclosed, the majority gamely conducts an end-run around the precedent and advances its new theory based on due process. Granted, when deciding *Garrett* the Supreme Court left open the question of Title II and whether it abrogated Eleventh Amendment immunity, but that does not give license to lower courts to reframe appellate issues on rehearing in order to avoid results with which they personally disagree. The *en banc* panel's effort to create a dispute worthy of reconsideration renders the admonition in Fed. R. App. P. 35 a nullity. *En banc* panels should not create conflicts merely to allow the pronouncement of new law. If this body wishes to consider Eleventh Amendment abrogation by the ADA under a due process theory, undoubtedly it will soon have that opportunity. In considering and deciding this case on a "due process theory," the *en banc* court is not "rehearing" anything; it is conducting an original hearing, and even then, on an issue the litigants have not presented.

2.

The case precedent in this circuit instructs courts to withhold judgment on issues not fully developed by the briefs or in the record. We have observed:

> "[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones."

McPherson v. Kelsey, 125 F.3d 989, 995-96 (6th Cir. 1997) (quoting *Citizens Awareness Network, Inc. v. United States Nuclear Regulatory Comm'n*, 59 F.3d 284, 293-94 (1st Cir. 1995)); *see Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 471 (6th Cir. 2000) (citing *United States v. Elder*, 90 F.3d 1110, 1118 (6th Cir. 1996)), *cert. denied*, 121 S. Ct. 1355 (2001). Of relevance to what is being done in this case, we cautioned in *United States v. Phibbs*, 999 F.2d 1053 (6th Cir. 1993), that "it is not our function to craft an appellant's argument." *Id.* at 1080 n.12. We have held that unbriefed issues are considered waived and unreviewable. *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1172 (6th Cir. 1996). It is for the parties, not the judges of this court, to raise important constitutional issues for our review, and only when such issues are raised, presented, and decided in the lower court. Our duty to decide such grave questions as the constitutional validity of an Act of Congress is properly discharged only when we have the benefit of a lower court decision, followed by full briefing and argument by the parties. *Sua sponte* rulings on issues of constitutional import

first conjured by the court in its internal deliberations are plainly at odds with our duty to give such issues fully informed and deliberate consideration.

The Supreme Court has demonstrated its allegiance to this prudent approach in declining to decide the very issue before this panel. In *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998), the Supreme Court declined to reach the *fully briefed* argument that Title II of the ADA violates the Eleventh Amendment. As the Court noted, even though the parties had briefed the argument, neither the district court nor the court of appeals had addressed the issue in its opinions and it did not wish to decide such an important matter without the lower courts' views. *Id.* at 212-13. It is a wonder why this court would proceed where the Supreme Court would not.

To be sure, the briefs of the *amicus* and the intervenor presented due process arguments. The *amicus* OLRS advanced due process as one of three grounds for affirmance of the district court's judgment. In its intervenor's brief, the DOJ's due process argument arises as part of its general contention that Congress had before it a large body of evidence showing unconstitutional state action in the provision of public services to the disabled. The DOJ argued that Title II embodies a variety of constitutional rights, including Fourteenth Amendment due process rights. It is

difficult to read either of these arguments as sufficiently briefing the difficult and abstruse due process issue the majority has handed to Popovich.

Despite the paucity of due process argument presented in the briefs, at oral argument one or two members of the court made repeated attempts to interest Popovich's counsel in the due process theory he had never advanced. In their "questions," these members attempted to explore a theory of Eleventh Amendment abrogation under a due process theory. They got very little clarification from Popovich's understandably surprised counsel. "One need only review the exchange at the *en banc* hearing of this case to know that many 'questions' posed by lawyers, and judges, while phrased in the form of questions are statements." *United States v. Susskind*, 4 F.3d 1400, 1410 (6th Cir. 1993) (*en banc*) (Merritt, J., dissenting). Despite the persistence of some members of the court, counsel for the parties failed to seize upon the due process argument.

B.

To summarize, the rule in this circuit is that it is not the appellate court's function to craft a party's argument. Absent some pressing concern, skeletal contentions are best left unaddressed. *En banc* proceedings represent an opportunity to clarify disputed matters of law fully vetted via

lower court decisions, panel review, and *en banc* briefing. They are not occasions for the advancement of new constitutional theories unexplored by the parties with the attendant risk of confusing important areas of constitutional law. In *Garrett*, the Supreme Court declared: "We are not disposed to decide the constitutional issue whether Title II . . . is appropriate legislation under § 5 of the Fourteenth Amendment when the parties have not favored us with briefing on the statutory question." *Garrett*, 531 U.S. at 360 n.1. This court should abide by that same caution. The parties have not sufficiently presented, and the court has not sufficiently considered, the due process issue; it is for another day.

III.

Ignoring these compelling reasons for not addressing the due process theory, the majority has chosen to do so and, worse, has reached an erroneous conclusion. Consequently, I, too, must address the substantive merits of that argument.

Congressional efforts to abrogate Eleventh Amendment immunity should proceed mindful of the Supreme Court's admonition that "[a]ny suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law." *City of Boerne v. Flores*, 521 U.S. 507, 527 (1997). True,

"Congress' power 'to enforce' the [Fourteenth] Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000) (quoting *City of Boerne*, 521 U.S. at 518). But Congress's efforts at remedial legislation cannot impermissibly effect a substantive redefinition of the Fourteenth Amendment. *Id.*

Our primary focus in this case should be whether, in enacting Title II of the ADA, Congress has validly abrogated the states' Eleventh Amendment immunity. The answer is that it has not, and that answer is dictated by the Supreme Court's Eleventh Amendment jurisprudence which must guide our analysis of the issue. As the Supreme Court stated in *City of Boerne*, and most recently developed in *Garrett*, abrogation of Eleventh Amendment immunity under the Fourteenth Amendment's § 5 power is valid only if a court can: (1) identify the scope of the right at issue; and (2) ensure that Congress is truly "enforcing" that right by appropriate legislation. *Garrett*, 531 U.S. at 365-69. A statute is appropriately enforcing legislation under § 5 only if it is truly "remedial." *See Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 638 (1999). "[F]or Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive

provisions, and must tailor its legitimate scheme to remedying or preventing such conduct." *Id.* at 639. In enacting Title II, Congress has not properly invoked § 5 because it has failed to identify conduct transgressing the Fourteenth Amendment's due process right and failed to tailor Title II to carefully remedy such conduct.

A.

As the Supreme Court stated in *Garrett*, "The first step . . . is to identify with some precision the scope of the constitutional right at issue." 531 U.S. at 365. Here, the constitutional right the majority claims is at issue is the Fourteenth Amendment's due process right. It should be obvious, however, that analyzing the plaintiff's claim as a due process right, and not an equal protection right, does not *automatically* remedy Title II's Eleventh Amendment violation.

The majority conflates the task of defining the right at issue with the critical step of determining whether the statute is appropriate, remedial legislation. True, due process challenges merit different levels of review depending on the specific due process right enforced. However, the emotionally appealing argument made in the majority opinion that parents have due process rights in termination of custody proceedings does not obviate the need to confront and analyze the

constitutional validity of Title II by first examining the Eleventh Amendment jurisprudence handed down by the Supreme Court.

Regardless of the right protected, if Congress wishes to legislatively abrogate the states' constitutional protection afforded by the Eleventh Amendment, it must first identify a history or pattern of state transgression of the *specific right* in question. As a second step, the court must determine whether the remedy is "congruen[t] and proportional[]" to the transgression. *City of Boerne*, 521 U.S. at 520. Casting the argument in terms of parental rights in child custody termination proceedings, the majority opinion finds that the Supreme Court "has unanimously agreed that 'the interest of parents in their relationship with their children is sufficiently *fundamental* to come within the finite class of liberty interests protected by the Fourteenth Amendment.'" Maj. Op. at __ (emphasis added) (quoting *Santosky v. Kramer*, 455 U.S. 745, 774 (1982) (Rehnquist, J., dissenting)). Be that as it may, defining the scope of parents' due process rights does not conclusively determine whether the legislation in question has met the Supreme Court's well-settled criteria for overcoming the Eleventh Amendment. Properly focused on that task, I conclude that it is entirely clear that Congress met neither of the criteria for trumping the Eleventh Amendment: it did not make adequate findings of a pattern of state transgressions and the legislation does not create a congruent and

proportional remedy.

B.

1.

Title II prohibits the exclusion of disabled individuals from participation in the activities of a public entity. 42 U.S.C. § 12132. Neither the language of the statute nor its legislative history give the slightest indication that when creating the statutory right, Congress identified a history or pattern of violations of disabled individuals' *due process* rights. In particular, there is no mention in the statute, either in its statement of legislative purpose or elsewhere, of the rights of disabled parents in the conduct of child custody termination hearings. While Congress made ample findings of "discrimination," almost all of the findings properly sound in equal protection, not due process. I do not question for a moment the fact that disabled individuals in our society have faced severe discrimination and hardship. But, the Supreme Court's Eleventh Amendment jurisprudence requires specific findings of discriminatory *state* action. And those findings must include the conclusion that due process rights, in particular, were violated. The legislative history of Title II supports no such finding.

There is some indication in Title II's legislative history

that it was passed in response to discrimination in the provision of public services and accommodations. In an exhaustive examination of the legislative history, the intervenor in this case notes a body of data demonstrating that disabled individuals have been denied *physical access* to courts, the right to vote, and educational opportunities. But it is quite clear that Congress assessed such evidence of discrimination as denial of equal protection, not denial of due process. For instance, the Committee on Education and Labor found that due to discrimination, the disabled have been denied "the opportunity to compete on an *equal* basis with others . . . ." H.R. Rep. No. 101-485(II), at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 310 (emphasis added). The Committee on the Judiciary wrote that "the goal [of Title II] is to eradicate the invisibility of the handicapped. Separate-but-equal services do not accomplish this central goal and should be rejected." H.R. Rep. No. 101-485(III), at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 473 (internal quotation marks, citation, and original alterations omitted). Finally, one of the ADA's sponsors in the House of Representatives stated: "Title II of this act is designed to continue breaking down barriers to the integrated participation of people with disabilities in all aspects of community life." 136 Cong. Rec. E1913, *E1916 (daily ed. May 22, 1990) (statement of Rep. Hoyer).

The court's effort to advance the due process theory at

oral argument only confirmed further that the findings Congress had before it sounded in equal protection. After considerable prompting from the bench to shift from an equal protection theory to a due process theory, and then only in response to a question from one of the judges, Popovich's counsel asserted that Congress had made findings that Title II was intended to remedy due process violations. Seizing upon Justice Breyer's dissenting opinion in *Garrett*, counsel invited our attention to Appendix C of the Breyer dissent, which contains a description of the submissions offered to the Task Force on Rights and Empowerment of Americans with Disabilities. *Garrett*, 531 U.S. at 391-424. These are not congressional "findings." They are nothing more than claims of discrimination offered at the many public hearings held by the Task Force, not by Congress. The *Garrett* Court majority noted of Appendix C, that it "consists not of legislative findings, but of unexamined, anecdotal accounts of adverse, disparate treatment by state officials." *Garrett*, 531 U.S. at 370 (internal quotation marks and citation omitted). The notion that the members of Congress relied upon the Task Force *allegations* to determine that the states were engaging in a pattern of due process violations is an unsupportable fiction. Moreover, of the 1,700 or more instances of discrimination identified by the Task Force and listed in Appendix C of Justice Breyer's dissent in *Garrett*, I can locate no more than 35 which arguably raise due process concerns. Of the limited number that could be read to implicate due

process--whether it be procedural or substantive due process is another matter--the vast majority are concerned with physical access to polls and courthouses. While I do not doubt that these are serious impediments for the disabled, it is not clear what individual legislators made of these Task Force findings, if indeed they ever heard of them. The best that can be said for them is that they raise equal protection concerns. I have difficulty assigning much credence to the argument that members of Congress relied on Task Force reports which include conclusions such as "state university denied sabbatical proposal of faculty member with disability," *id.* at 410, or "child denied admission to public school because first-grade teacher refused to teach him," *id.* at 420. The intervenor and the majority opinion would have us infer that the individuals' disabilities *caused* the state to act as it did. But, such Task Force "findings" provide legislators with no support for the contention that the states violated disabled individuals' due process rights so routinely as to amount to a pattern of discrimination. Indeed, the findings tell legislators nothing about state actions toward the disabled.

Moreover, the ADA's statement of legislative Findings and Purpose offers no support for the contention that Congress identified a pattern of state due process violations. For instance, 42 U.S.C. § 12101 (expressing the ADA's Findings and Purpose) offers the following, in pertinent part:

> [D]iscrimination against individuals with

> disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.

Id. at § 12101(a)(3). One has to stretch mightily to read this language as an affirmative statement by Congress that it was identifying and remedying *state* action that violated disabled individuals' *due process* rights. This section is a statement of the act's purpose for each of the five titles in the ADA, and it cannot be read to refer to Title II specifically. Furthermore, with the exception of the reference to voting, I do not read in § 12101 the necessary finding by Congress that the disabled suffered violations of their due process rights at the hands of states.

Therefore, whatever might be said for the highly generalized statement of purpose with which Congress elucidated its goal in enacting the ADA, it certainly did not identify a pattern of due process violations.

2.

Congress's authority to enact general remedial legislation under § 5 is limited to rectifying conduct that is

unconstitutional, not merely undesirable. While Congress determines whether and what legislation is necessary to enforce the guarantees of the Fourteenth Amendment, Congress may not define the bounds of a constitutional violation, *Kimel*, 528 U.S. at 80-81; only the courts may do that. And that is precisely the constitutional flaw in the ADA. The act proscribes too much conduct that is not unconstitutional and thus effects a substantive redefinition of constitutional rights. The ADA's provisions must "be understood 'as responsive to, or designed to prevent, unconstitutional behavior.'" *Florida Prepaid*, 527 U.S. at 639 (quoting *City of Boerne*, 521 U.S. at 532). In the language of the Supreme Court, "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520. Title II fails the congruence and proportionality test.

Title II is an overbroad proscription. This court has noted on a previous occasion that § 12132 of Title II, which prohibits discrimination against the disabled, "encompasses virtually everything that a public entity does." *Johnson v. City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998). Title II prohibits all state conduct that restricts access of the disabled to public services for any reason, without regard to whether the service invokes a constitutional right. Admittedly, Title II requires only "reasonable accommodation." *Id.* at 571. And a

claimant's recovery under Title II is limited to compensatory damages. *Id.* at 573. But these limitations are of little comfort. The Eleventh Amendment does not protect state sovereignty only against relatively large damage awards or subjectively "unreasonable" incursions; it protects the whole of state sovereignty. By its overbreadth, Title II impermissibly attempts a substantive redefinition of Fourteenth Amendment due process.

A plain reading of Title II demonstrates that even if Congress had before it a pattern of state behavior violative of disabled individuals' due process rights, which it did not, Title II is not sufficiently nuanced to protect that right. It is beyond question that Congress can protect constitutional rights, but it may not create them. As the Supreme Court has observed, "[W]e have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation." *Kimel*, 528 U.S. at 88. But, Title II prohibits much more behavior than is necessary to remedy any state violations of disabled individuals' due process rights. As the Court held in *Kimel*, "Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field." *Id.* at 91. As discussed above, the legislative findings of unconstitutional behavior by the states contain little evidence directly implicating due process. The Supreme Court has made it very clear that Congress may not,

through § 5 "enforcement" legislation, remedy that which it has not identified.

IV.

In summary, Eleventh Amendment abrogation under Congress's § 5 power is valid only if the legislation is truly enforcing legislation. The Supreme Court's analysis of whether legislation is permissible enforcing legislation turns on the determination of whether the legislation remedies unconstitutional state action, and whether it is tailored to avoid effecting a substantive redefinition of the constitutional right. Title II ventures far beyond the Court's definition of enforcing legislation. First, Congress failed to identify a pattern of state action that violates disabled individuals' due process rights, and, second, Title II of the ADA is not congruent and proportional to any identified state conduct. Therefore, Title II of the ADA is not a constitutionally valid abrogation of state sovereign immunity.

I respectfully dissent.

CONCURRING IN PART, DISSENTING IN PART

RONALD LEE GILMAN, Circuit Judge, concurring

in the judgment, but dissenting from the composition of the en banc court. Although I fully concur in the judgment of the court that upholds the constitutionality of Title II of the Americans with Disabilities Act, I find myself in the unusual and uncomfortable position of having to write separately because I believe that there is a procedural flaw in the composition of the en banc court. Specifically, I am of the opinion that 28 U.S.C. § 46(c) (delineating which judges are eligible to sit on an en banc court) precludes Judge Merritt from participating in this case, despite language to the contrary in the version of this court's Internal Operating Procedure (I.O.P.) 35(a) that existed on the date of oral argument.

The problem arises from the fact that, although Judge Merritt was an "active" judge when the request was made in December of 2000 to rehear this case en banc, he took "senior status" on January 17, 2001. 28 U.S.C. § 371(b)(1) (defining a senior circuit judge as one who is "retired from regular, active service"). Judge Merritt was thus not an active judge at the time this case was orally argued on June 6, 2001, nor was he a member of the original three-judge panel assigned to this matter.

The applicable statute, 28 U.S.C. § 46(c), as amended in 1996, provides in pertinent part as follows:

> A court in banc shall consist of all circuit judges in regular active service . . . except that any senior circuit judge of the circuit shall be eligible (1) to participate . . . as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service.

This court's former I.O.P. 35(a), in contrast, read as follows:

> The en banc Court is composed of all judges in regular active service at the time of a rehearing, any senior judge of the Court who sat on the original panel, *and any judge who was in regular active service at the time a poll was requested on the petition for rehearing en banc* . . . .

(Emphasis added.)

In comparing § 46(c) with this court's then-existing I.O.P. 35(a), one can immediately spot the discrepancy: the I.O.P. allowed a senior status judge to sit on an en banc case if the judge was active when the request for an en banc poll

was made, but the statute requires a judge to still be active at the time the case is heard or reheard en banc. Although not controlling in the present case, this discrepancy has been resolved for future cases by this court adopting a new I.O.P. 35(a) on October 31, 2001. The new I.O.P. 35(a) reads as follows:

> The en banc court is composed of (1) all judges in regular active service at the time of oral argument en banc or, if no oral argument en banc is held, on the date that the en banc court agrees to decide the case without oral argument, and (2) any senior judge of the Court who sat on the original panel. Only Sixth Circuit judges in regular active service may cast votes on a poll on the en banc petition itself. See 28 U.S.C. § 46(c).

For the remainder of this opinion, I will be referring to I.O.P. 35(a) as it existed when this case was orally argued on June 6, 2001. Because I.O.P. 35(a) did not conform with § 46(c) until the revised version of the I.O.P. was passed on October 31, 2001, we are left to determine the proper status of one in the position of Judge Merritt who was active when the en banc poll was requested, but who took senior status before the case was orally argued.

The issue as I see it is not whether our I.O.P. controls over § 46(c). I do not believe that anyone seriously contests the principle that an act of Congress prevails over an inconsistent internal rule of court. *Memphis Planned Parenthood, Inc. v. Sundquist*, 175 F.3d 456, 464 (6th Cir. 1999) ("When a rule of court conflicts with a legislative act, the general rule is that the act controls."). Rather, the only question is whether one can possibly reconcile this court's I.O.P. with the statute by arguing that an en banc case is "heard or reheard" when the poll is requested rather than when the case is orally argued.

For the purpose of this decision, there is no relevant distinction between a case being heard en banc as opposed to being reheard en banc. A case is *heard* en banc in the rare situation when the whole court decides to take up an appeal directly, without the matter first being decided by a three-judge panel. In contrast, a case is *reheard* en banc in situations where the court grants a party's petition for rehearing by the entire court after a three-judge panel has ruled adversely to that party. This case involves the more typical rehearing after a decision by a three-judge panel. For the sake of simplicity and clarity, however, I will confine further discussion to the issue of determining when a case is *heard* en banc. The same conclusion necessarily follows for a case *reheard* en banc.

Turning now to this key issue, I find no support for the proposition that a case is heard en banc when a poll is requested to determine whether the case should be considered by the court as a whole. Polling is a procedural matter, not a decision on the merits of the case. Nor does such a proposition comport with the common understanding of what being "heard" means. Black's Law Dictionary 725 (7th ed. 1999) (defining a "hearing" as "[a] judicial session, usu[ally] open to the public, held for the purpose of deciding issues of fact or of law, sometimes with witnesses testifying.").

In 1996, § 46(c) was amended to allow a senior judge "to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service." 28 U.S.C. § 46(c); Pub. L. No. 104-175, § 1. The legislative history reflects that the 1996 amendment to 28 U.S.C. § 46(c) was proposed in order to resolve the ambiguity of whether a judge on active status when an en banc case is orally argued can continue to participate if he or she takes senior status before the opinion is issued. Senator Simon of Illinois stated the issue as follows: "The bill I introduce today would simply clarify that circuit judges who hear an en banc case as active judges may participate in the ultimate decision of the case even if they take senior status between the time the case is argued and the time it is decided." 141 Cong. Rec. S2133 (daily ed. Feb. 3, 1995). Similarly, Representative Moorehead

of California made the following observation:

> [Section 46(c)] has been interpreted to require a circuit judge in regular active service who has heard argument in an en banc case to case [sic, clearly a mistype of "cease"] participating in that case upon taking senior status. This problem leads to uncertainty in deciding who will be eligible to vote on the final disposition of an appeal and may create the perception that a judge is delaying release of an en banc opinion until a member of the en banc court takes senior status.

142 Cong. Rec. H8608 (daily ed. July 29, 1996).

Turning now to the matter at hand, I believe it quite clear that this case was "heard" on June 6, 2001. This was the date of oral argument, the date when the judges of the en banc court retired to discuss the merits following oral argument, and the date when we tentatively voted on the outcome of the case. In contrast, the request for a poll of the active judges in December of 2000 to vacate the ruling of the three-judge panel and consider the case en banc was not outcome-determinative. That action simply set the stage for the hearing on the merits that took place six months later.

Judge Merritt was no longer an active judge when the case was heard en banc (i.e., orally argued, discussed in conference, and tentatively decided) on June 6, 2001. He was therefore ineligible to sit as a member of the en banc court pursuant to the express terms of 28 U.S.C. § 46(c), despite language to the contrary in this court's then-existing I.O.P. 35(a). Expressed another way, our former I.O.P. 35(a) was void because it directly conflicted with the controlling statutory language of § 46(c). *Memphis Planned Parenthood, Inc.*, 175 F.3d at 464. In contrast, both Judge Norris (who took senior status on July 1, 2001) and Judge Suhrheinrich (who took senior status on August 15, 2001) are authorized by the language of § 46(c) to continue participating in this case, because they were both active judges when the matter was heard on June 6, 2001.

I reach this conclusion with great reluctance, both because I recognize that the validity of our former I.O.P. 35(a) has not been previously questioned in this case, and because I agree with the result reached in Judge Merritt's opinion. Nor do I wish to impugn in any way Judge Merritt's integrity or his good faith belief that he is entitled to sit as a member of the en banc court. Based upon my analysis of § 46(c), however, I feel that I have no choice but to voice my disagreement with the composition of the en banc court in this case.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH M. POPOVICH, Plaintiff-Appellee/Cross-Appellant,

v.

CUYAHOGA COUNTY COURT OF COMMON PLEAS, Domestic Relations Division, Defendant-Appellant/Cross-Appellee,

CUYAHOGA COUNTY, Defendant-Appellee.

Nos. 98-4100/98-4540

December 12, 2000, Filed

ORDER

A majority of the Judges of this Court in regular active service have voted for rehearing of these cases en banc. Sixth Circuit Rule 35(a) provides as follows:

"The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal."

Accordingly, it is **ORDERED**, that the previous decision and judgment of this court is vacated, the mandate is stayed and these cases are restored to the docket as pending appeals.

It is **FURTHER ORDERED** that the cases will be held in abeyance pending the decision of the U.S. Supreme Court in *University of Alabama Board of Trustees v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866, argued October 11, 2000.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH M. POPOVICH, Plaintiff-Appellee/Cross-Appellant,

v.

CUYAHOGA COUNTY COURT OF COMMON PLEAS, Domestic Relations Division, Defendant-Appellant/Cross-Appellee,

CUYAHOGA COUNTY, Defendant-Appellee.

Nos. 98-4100/4540

Appeal from the United States District Court for the Northern District of Ohio at Akron. No. 95-00684---James S. Gallas, Magistrate Judge.

Argued: April 26, 2000
Decided and Filed: September 18, 2000

Before: RYAN and BOGGS, Circuit Judges; DUGGAN, District Judge.

* The Honorable Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

COUNSEL:

ARGUED: Bruce B. Elfvin, ELFVIN & BESSER, Cleveland, Ohio, for Appellant. Richard C. Haber, REMINGER & REMINGER, Cleveland, Ohio, for Appellee. **ON BRIEF:** Bruce B. Elfvin, Barbara Kaye Besser, Amy S. Glesius, ELFVIN & BESSER, Cleveland, Ohio, for Appellant. Richard C. Haber, REMINGER & REMINGER, Cleveland, Ohio, for Appellee.

OPINION

RYAN, Circuit Judge. This case presents a question of first impression in this court: whether Congress validly abrogated Eleventh Amendment immunity by applying Title II of the Americans with Disabilities Act (ADA) to the States. We hold that it did not and that, as a consequence, we must reverse the district court's judgment for the plaintiff.

Joseph M. Popovich brought three federal claims against the Domestic Relations Division of the Cuyahoga County Court of Common Pleas (DRD), an arm of the State of Ohio, alleging: (1) failure to accommodate his hearing disability, in violation of Title II of the ADA; (2) retaliation, in violation of the ADA; and (3) a 42 U.S.C. § 1983 claim. Popovich's claims arise out of the DRD's alleged failure to provide him with an adequate hearing aid in the course of a

prolonged child custody dispute. A jury awarded Popovich $400,000 in compensatory damages and the district court awarded injunctive relief. Despite myriad issues raised on appeal, we need reach only one: whether Congress exceeded its authority in purporting to abrogate Eleventh Amendment immunity under Title II. As we have said, we hold that it did and therefore we will REVERSE the district court's judgment.

I.

A. *FACTUAL BACKGROUND*

Popovich was divorced in 1985. On August 9, 1990, Popovich's ex-wife Norma Jenell Whisenant filed a motion with the DRD to enforce her right of companionship with her daughter, a child of her marriage to Popovich. During a hearing on the motion in August 1992, Popovich informed the hearing referee that he was having trouble hearing the proceedings, making his participation difficult. The referee postponed the proceedings to resolve Popovich's concern and ordered him to undergo an audiological examination at his own expense. The exam confirmed that Popovich had mild to moderate hearing loss with no sign of an ear infection or other disease. Based on her examination of Popovich, the audiologist recommended that the court provide an FM amplification system with a pass-around microphone and headphones.

On August 24, 1992, while the custody action was still pending, Whisenant filed a petition of domestic violence requesting a temporary restraining order against Popovich. The next morning, the DRD held an *ex parte* hearing and granted the mother temporary custody of her daughter. The daughter was removed from Popovich's home, and Popovich was prohibited from having any contact with her. On the same day, the DRD held a hearing to consider the results of Popovich's audiological exam. The parties stipulated that Popovich suffered from a hearing impairment that required "speech augmentation equipment." The DRD adopted most of the audiologist's recommendation, agreeing to use an FM amplification system to accommodate Popovich's hearing loss. For security reasons, however, the DRD decided to use a conference-style microphone rather than a so-called "pass-around" microphone. Popovich's counsel acknowledged at the time that this accommodation was satisfactory, and Popovich has not challenged the DRD's decision to use a conference-style microphone rather than a pass-around microphone.

The DRD declared a mistrial in the custody case on August 27, 1992, and reassigned the case to another judge. Between September 2 and October 23, a referee held hearings on the domestic violence petition. During these hearings, the DRD used the FM amplification system with the centrally located microphone, and Popovich wore headphones.

On October 23, Popovich complained to the referee of an ear infection, claiming it was due to his use of the headphones. Popovich moved for a continuance to allow the infection to clear up. Attached to the motion was a letter from Popovich's physician stating that he had been under a physician's care for an ear infection that was expected to improve in three to four weeks. The referee granted a continuance and requested that Popovich provide the DRD with information from a physician about the ear infection. The deadline for submission of this information was November 5, and the custody hearing was adjourned to December 1, 1992. Popovich, however, provided no further information to the DRD concerning the ear infection or its prognosis.

On December 1, a few minutes before the hearing was to recommence, Popovich filed a motion requesting real-time captioning in the courtroom to accommodate his hearing deficiency. The referee gave Popovich the choice of proceeding with the custody hearing that day using the FM amplification system, or staying the custody hearing and scheduling a later hearing on the motion for real-time captioning. Popovich chose the latter option. A hearing to determine the appropriate accommodation was scheduled for February 1, 1993, but it was canceled due to the referee's illness.

Although Popovich's counsel initially conceded that

the FM amplification system was effective, Popovich apparently had concerns about the DRD's response to his hearing deficiency almost from the beginning. In late August 1992, well before the ear infection, Popovich filed a charge of discrimination with the Department of Justice (DOJ) concerning the DRD's actions to accommodate his hearing deficiency. The DOJ commenced an investigation. The DRD was notified on December 2, 1992, of the discrimination charge and the DOJ's investigation.

On February 19, 1993, and again on March 24, the DOJ recommended to the DRD that it recommence the custody proceedings. On May 28, the DOJ sent a letter to the DRD requesting a response to Popovich's discrimination charge. In its response, the DRD stated that Popovich was free to bring any auxiliary aid to the courtroom at his own expense, but it insisted that the DRD had met its obligation to reasonably accommodate Popovich's condition by providing the FM amplification system.

On June 1, 1993, Whisenant filed a motion requesting that the DRD continue the August 1992 *ex parte* order. The court granted the motion, extending the order over Popovich's objection.

On March 31, *1994*, the DOJ informed the DRD that the DRD could hold an *ex parte* hearing or an informal

hearing to determine the appropriate auxiliary aid. The judge convened a conference four months later to discuss auxiliary aids. At the conference, Popovich presented evidence of his hearing loss and a severe skin condition in both ear canals. On October 7, the DRD agreed to order real-time captioning for Popovich. The DRD judge entered an order shortly thereafter allowing Popovich to visit his daughter. For reasons not apparent to this court, Popovich waited until the summer of 1997 to see his daughter. His daughter moved in with him on October 31, 1997, despite a state court order prohibiting such living arrangement.

B. *PROCEDURAL HISTORY*

Popovich filed his complaint in federal district court on March 23, 1995, and an amended complaint on September 15, 1995. His amended complaint alleged that the DRD and Cuyahoga County discriminated against him in violation of Title II of the ADA, retaliated against him in violation of the ADA, and violated 42 U.S.C. § 1983. Popovich claimed that as a result of the defendants' conduct, he was prohibited from seeing his daughter for approximately five years, from the time she was 11 years old until she was 16.

On April 6, 1998, a jury returned a verdict for Popovich, finding that the defendants violated Title II of the ADA and/or retaliated against him in violation of the ADA.

The jury awarded compensatory damages in the amount of $400,000. The magistrate judge entered the jury's award and, based on the jury's finding, awarded injunctive relief: (1) requiring the defendants to provide real-time captioning for Popovich in the state custody matter; (2) enjoining the defendants from discriminating against him in connection with providing any auxiliary aids; and (3) enjoining the defendants from retaliating against him. The defendants filed timely post-trial motions for new trial, for judgment as a matter of law, and for remittitur. The district court granted judgment as a matter of law in favor of Cuyahoga County, but denied the remainder of the requested relief. The court also denied Popovich's request for pre-judgment interest.

The defendants filed a timely notice of appeal. Popovich cross-appealed the dismissal of Cuyahoga County and the denial of pre-judgment interest. However, at oral argument before this court, Popovich withdrew his cross-appeal against the County and waived his right to appeal the pre-judgment interest issue as a matter of law, because his briefs did not address it. *See Buziashvili v. Inman*, 106 F.3d 709, 719 (6th Cir. 1997). Therefore, we will consider only the claims against the DRD.

II.

A. *JURISDICTION TO CONSIDER ELEVENTH AMENDMENT IMMUNITY*

We first address the plaintiff's contention that we lack jurisdiction to consider the DRD's Eleventh Amendment argument. The plaintiff maintains that the DRD waived its right to assert this defense by failing to raise the issue earlier in the proceedings. We disagree.

Although the DRD claimed in its amended answer that it is "immune" from liability, its immunity argument before the district court focused solely on judicial immunity. The DRD never explicitly invoked Eleventh Amendment immunity at the district court level, nor did its original appeal brief touch on the issue. The DRD first mentioned the Eleventh Amendment in its reply brief on appeal, and even that reference was cryptic. We certainly do not condone the DRD's late assertion of Eleventh Amendment immunity, but we do not think we are, as a matter of law, foreclosed from considering it. Indeed, for the reasons that follow, we are satisfied that we have discretion to do so.

The Eleventh Amendment immunity defense may be raised for the first time on appeal. *Edelman v. Jordan*, 415 U.S. 651, 678 (1974). We may even consider the issue *sua*

sponte. *Estate of Ritter v. University of Michigan*, 851 F.2d 846, 850 (6th Cir. 1988); *State of Ohio v. Madeline Marie Nursing Homes No. 1 and No. 2*, 694 F.2d 449, 459-60 (6th Cir. 1982). Indeed, there is authority in this circuit holding that we *must* consider Eleventh Amendment immunity *sua sponte*. *Wilson-Jones v. Caviness*, 99 F.3d 203, 206 (6th Cir. 1996), *as amended by* 107 F.3d 358, 358-59 (6th Cir. 1997). The plaintiff argues that *Wilson-Jones* is no longer good law in light of *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381 (1998), in which the Supreme Court stated that a court need not address Eleventh Amendment immunity if the parties do not raise it. *Schacht*, 524 U.S. at 389. While *Schacht* casts doubt on our holding in *Wilson-Jones*, neither the Supreme Court nor this court has suggested that we lack jurisdiction to consider an Eleventh Immunity defense raised late in the proceedings, or not at all. *See Mixon v. State of Ohio*, 193 F.3d 389, 397 (6th Cir. 1999).

The plaintiff urges us to follow authority from the Ninth and First Circuits holding that a state defendant waives its right to assert Eleventh Amendment immunity by failing to raise it earlier in the proceedings. *See Hill v. Blind Indus. & Servs. of Maryland*, 179 F.3d 754, 756-58 (9th Cir. 1999), *as amended by* 201 F.3d 1186 (9th Cir. 2000); *Torres v. Puerto Rico Tourism Co.*, 175 F.3d 1, 5 (1st Cir. 1999). To the extent that these authorities may stand for the proposition that we lack *discretion* to hear a late Eleventh Amendment

defense, we decline to follow them.

At oral argument, the plaintiff also relied on *Cuyahoga Valley Railway Co. v. Tracy*, 6 F.3d 389 (6th Cir. 1993), in arguing that the DRD waived the immunity argument by failing to raise it earlier. That case is distinguishable. In *Cuyahoga*, intrastate railroads challenged Ohio's railroad excise tax. The district court entered summary judgment in favor of the railroads, *and the State of Ohio did not appeal this order*. Several months later, interstate railroads moved to intervene. The court granted the intervention motions and entered a modified summary judgment in favor of the intervenors, limiting the scope of summary judgment to apply only to the original plaintiffs. The State appealed, challenging the order granting intervention and the order modifying summary judgment. As to summary judgment, the State argued that the court's remedy violated the Eleventh Amendment. *Id.* at 394. We held that the State had waived its right to raise this argument by failing to timely appeal the original summary judgment. *Id.* at 395. Here, in contrast, the DRD timely appealed the district court's judgment. Although *Cuyahoga* also recites in a footnote the general rule that we "will not consider arguments raised for the first time on appeal," *id.* at n.6, it does not limit our discretion to do so in the appropriate case.

We are satisfied that the clear weight of authority is

that it is within our discretion to decide when the circumstances merit consideration of a delayed sovereign immunity defense, and we believe it is appropriate to do so in this case for a number of reasons: the importance of the issue; its wide-reaching effect; the substantial uncertainty about the current state of the law; and the fact that, in response to our request the parties have submitted supplemental briefs on the issue.

The availability of Eleventh Amendment immunity under the ADA has split the circuits, and neither the Supreme Court nor this court has tackled the issue to date. *See Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998); *Nelson v. Miller*, 170 F.3d 641, 647-48 (6th Cir. 1999). The parties in this action, and other parties who may be pursuing or preparing to pursue claims under Title II, deserve our answer to this question. Moreover, because the parties have now fully briefed the issue at our post-hearing direction, the plaintiff has suffered no prejudice from the DRD's failure to raise Eleventh Amendment immunity earlier in the proceedings.

B. *AVAILABILITY OF ELEVENTH AMENDMENT IMMUNITY*

The Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. The Supreme Court has interpreted this language to mean "that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman*, 415 U.S. at 663. An Ohio Common Pleas Court, including the Domestic Relations Division, is "an arm of the state for purposes of ... Eleventh Amendment immunity analys[i]s." *Mumford v. Basinski*, 105 F.3d 264, 269 (6th Cir. 1997). Thus, we must decide whether the DRD is immune from suit in federal court.

There are three exceptions to a State's sovereign immunity under the Eleventh Amendment. First, a State waives the immunity when it consents to suit in federal court. *See Green v. Mansour*, 474 U.S. 64, 68 (1985); *Nelson*, 170 F.3d at 645-46. It is undisputed that the DRD has not done so here. *See Mixon*, 193 F.3d at 397. Second, the Amendment does not bar a suit against a state official seeking prospective injunctive relief to end a continuing violation of federal law. *Ex parte Young*, 209 U.S. 123, 167 (1908); *Lawson v. Shelby*

County, Tennessee, 211 F.3d 331, 335 (6th Cir. 2000). This exception is also inapplicable, as Popovich no longer asserts any claim against a "state official."

A third exception applies where Congress validly abrogates Eleventh Amendment immunity. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996); *Nelson*, 170 F.3d at 646. This is the exception at issue here, and we now proceed to consider it.

1. *The Abrogation Exception*

a. Clear and Unequivocal Statement

As a preliminary matter, we note that Popovich's claim arises under Title II, Part A, of the ADA. Title II, Part B, of the ADA governs public transportation, and we have not had occasion to consider the provisions of Part B in this case. We intend our references to the "ADA" in this opinion to refer solely to Title II, Part A, of the ADA.

To determine whether Congress validly abrogated State immunity under Title II of the ADA, we must resolve two issues: (1) "whether Congress unequivocally expressed its intent to abrogate" the immunity; and (2) "if it did, whether Congress acted pursuant to a valid grant of constitutional authority." *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631,

640 (2000). As to the first question--whether Congress unequivocally stated its intent to abrogate the immunity under Title II--there is no question that it did. *See Nelson*, 170 F.3d at 647 n.6. In 42 U.S.C. § 12202, Congress expressly stated: "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of" the ADA. *Id.* In addition, Title II's substantive requirements govern the conduct of any "public entity," defined to include "any *State* or local government." 42 U.S.C. § 12131(1)(A) (emphasis added).

b. Valid Exercise of Constitutional Authority

The second prong of the abrogation exception--whether, in abrogating the State's Eleventh Amendment immunity, Congress acted pursuant to a valid grant of constitutional authority--is more complicated. We recently explained that this prong involves two inquiries: (1) whether Title II of the ADA was "'passed pursuant to a constitutional provision granting Congress the power to abrogate'"; and (2) "whether the substantive provisions of the ADA are a valid exercise of Congress's [enforcement] power" under the relevant constitutional provision. *Nelson*, 170 F.3d at 648 (quoting *Seminole Tribe*, 517 U.S. at 59). The Supreme Court has made clear that the Commerce Clause is not a source of authority for Congress to abrogate Eleventh Amendment

immunity. *Seminole Tribe*, 517 U.S. at 72-73. However, the Court has said that Congress does derive such authority from Section 5 of the Fourteenth Amendment. *Id.* at 59. The Amendment provides, in relevant part:

> **Section 1**. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . .
>
> **Section 5**. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV, §§ 1, 5. Congress invoked Section 5 of the Fourteenth Amendment as one of its sources of authority in enacting the ADA. 42 U.S.C. § 12101(b)(4). Thus, Title II was "passed pursuant to a constitutional provision granting Congress the power to abrogate." *Nelson*, 170 F.3d at 648.

The current debate over Eleventh Amendment

immunity focuses not on the *source* of Congress's abrogation authority, but the scope of that authority. *See id.* Over the past three years, the Supreme Court has addressed the scope of Congress's enforcement authority under the Fourteenth Amendment on several occasions. *See Kimel*, 120 S. Ct. 631; *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199 (1999); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *City of Boerne v. Flores*, 521 U.S. 507 (1997). This jurisprudence guides our analysis, and we pause to summarize its most salient features.

Congress's enforcement power under the Fourteenth Amendment "includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, 120 S. Ct. at 644. On the other hand, authority to determine "'what constitutes a constitutional violation'" resides solely with the courts--not with Congress. *Id.* (emphasis omitted) (quoting *City of Boerne*, 521 U.S. at 519). In other words, "Congress does not enforce a constitutional right by changing what the right is." *City of Boerne*, 521 U.S. at 519. The Court has acknowledged that this simple distinction is not easy to apply. "[T]he determination whether purportedly prophylactic legislation constitutes appropriate remedial legislation, or instead effects a substantive redefinition of the Fourteenth

Amendment right at issue, is often difficult. The line between the two is a fine one," and Congress has "'wide latitude'" in deciphering that line. *Kimel*, 120 S. Ct. at 644 (citations omitted). To aid courts in this delicate analysis, the Supreme Court has adopted the following principle: Congress properly exercises its Fourteenth Amendment enforcement authority where there is "'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Id.* (quoting *City of Boerne*, 521 U.S. at 520).

Two recent Supreme Court cases illustrate the application of the "congruence and proportionality" test. The Court first adopted the test in *City of Boerne*, 521 U.S. 507. There the Court held that Congress exceeded its authority under the Fourteenth Amendment in enacting the Religious Freedom Restoration Act of 1993 (RFRA). The RFRA prohibited governments, including States, from "'substantially burden[ing]' a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" *Id.* at 515-16 (citations omitted). The proponents of the RFRA argued that the statute's focus on the effects of a challenged ordinance, rather than deliberate or overt discrimination, fell within Congress's power under the Fourteenth Amendment to prevent and remedy constitutional

violations. *Id.* at 517.

In applying the "congruence and proportionality" test, the Court looked to the legislative history for evidence of conduct violating the Fourteenth Amendment--in other words, evidence of "generally applicable laws passed because of religious bigotry." *Id.* at 530. The RFRA's legislative history is devoid of such evidence. In fact, the legislative history indicates that "Congress' concern was with the incidental burdens imposed," rather than the "object or purpose of the [challenged] legislation." *Id.* at 531. The lack of evidence of a constitutional violation, however, was not the RFRA's "most serious shortcoming." *Id.* The Court concluded:

> RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections. Preventive measures prohibiting certain types of laws [or conduct] may be appropriate when there is reason to believe that many of the laws [or conduct] affected by the congressional enactment have a significant likelihood of being unconstitutional. . . .

RFRA is not so confined.

Id. at 532.

While Popovich's case was pending, the Supreme Court extended its *Eleventh Amendment jurisprudence in Kimel*, 120 S. Ct. 631, a case that is analogous in many respects to this case. In *Kimel*, several groups of plaintiffs filed suit against their State employers claiming protection under the Age Discrimination in Employment Act (ADEA). After finding that Congress had unequivocally expressed its intention to apply the ADEA to the States, the Court proceeded to apply the "congruence and proportionality" test and held that Congress exceeded its authority to abrogate Eleventh Amendment immunity in applying the ADEA to the States. *Id.* at 637.

The Court began its analysis by observing that age is not a suspect classification under the Equal Protection Clause. *Id.* at 646. Thus, a State "may discriminate on the basis of age" if age is "rationally related to a legitimate state interest." *Id.* This, of course, is a fairly low hurdle to clear. The Court "'will not overturn [government conduct] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational.'" *Id.* (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)). It makes no difference that age is an imperfect proxy

for characteristics relevant to the State's legitimate interests. *Id.* The Constitution "permits States to draw lines on the basis of age when they have a rational basis for doing so at a class-based level, even if it 'is probably not true' that those reasons *are valid in the majority of cases.*" *Id.* at 647.

The Court then evaluated the substantive provisions of the ADEA against the backdrop of the Fourteenth Amendment requirements. The ADEA prohibits employers from discriminating on the basis of age, with only a few narrow exceptions. The Court found that the law, "through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." *Id.* The Court also rejected the petitioners' reliance on the statutory exceptions under the ADEA, reasoning that even with those exceptions the law restricted the States' conduct far more than the rational basis test. *Id.* For example, the "bona fide occupational qualification" (BFOQ) exception imposed a burden on the employer to prove "reasonable necessity" for using an age classification, which the Court described as "a far cry from the rational basis standard we apply to age discrimination under the Equal Protection Clause." *Id.* The Court concluded that the ADEA was "'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent,

unconstitutional behavior.'" *Id.* (quoting *City of Boerne*, 521 U.S. at 532).

The Court also recognized Congress's power to enact prophylactic legislation. *Id.* at 648. The Court held, however, that the ADEA was not properly characterized as remedial because Congress did not have evidence of a significant problem of constitutional dimension requiring prophylactic legislation. *Id.* at 648-49. As it had in *City of Boerne*, the Court relied on the legislative history as a means to evaluate whether a significant evil justified Congress's strong remedial measures. *Id.* at 648; *see also Florida Prepaid*, 119 S. Ct. at 2207-11.

> Our examination of the ADEA's legislative record confirms that Congress' 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem. Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation. The evidence compiled by petitioners to demonstrate such attention by Congress to age discrimination by the States falls well short of the mark. That evidence consists almost entirely of isolated sentences clipped from

floor debates and legislative reports.

Kimel, 120 S. Ct. at 648-49. The Court rejected the petitioners' reliance on Congress's findings of age discrimination in the private sector, reiterating Congress's failure "to identify a widespread pattern of age discrimination by the States." *Id.* at 649.

The Court concluded:

> In light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States, we hold that the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment.

Id. at 650.

2. *Title II of the ADA*

As we have said, because it is clear that Congress satisfied the first prong of the abrogation exception by clearly and unequivocally stating its intent to abrogate Eleventh Amendment immunity under the ADA, our task is to decide whether, in doing so, Congress exceeded its authority to

enforce the Fourteenth Amendment. Although the statutes involved in *Kimel* and *City of Boerne* are distinguishable in several respects from the ADA, these distinctions are not sufficient to protect Title II from the fate that befell the RFRA and the ADEA. Indeed, we believe that the ADA shares attributes with both the RFRA and the ADEA that make this law even more difficult to justify under Section 5 of the Fourteenth Amendment.

To apply the "congruence and proportionality" test, we first must identify the "unconstitutional conduct that conceivably could be targeted by the [ADA]." *Kimel*, 120 S. Ct. at 645. Title II provides, in relevant part:

> no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Thus, Title II is designed to protect disabled persons, as defined under the statute. *See id.* § 12131(2).

It is well established that disability is not a suspect class for purposes of equal protection analysis. *Heller v. Doe*,

509 U.S. 312, 321 (1993); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441-47 (1985); *see also Bartell v. Lohiser*, 215 F.3d 550, 559 (6th Cir. 2000). The State may discriminate on the basis of disability if such classification is rationally related to a legitimate state interest. We recognize that the reasons identified in *Kimel* as to why age-based classifications do not deserve heightened scrutiny under the Equal Protection Clause are not justifications that necessarily apply in the disability context. For example, the Court noted that "[o]ld age . . . does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it." *Kimel*, 120 S. Ct. at 645. However, *Kimel* does nothing to undermine the Supreme Court precedent holding that disability deserves only rational basis scrutiny; we are bound to follow this precedent. Likewise, Congress's characterization of the disabled as a "discrete and insular minority" in the text of the ADA, 42 U.S.C. § 12101(a)(7), cannot override *Cleburne*. This legislative "finding," invoking the buzzwords associated with heightened scrutiny, "evinces an intent not to remedy [conduct that violates the *Cleburne* rational basis standard], but rather to effect a substantive alteration of" *Cleburne*. *Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698, 708 (4th Cir. 1999) (internal quotation marks and citation omitted), *petition for cert. filed*, 68 USLW 3164 (U.S. Sept. 8, 1999) (No. 99-424). As such, the "discrete and insular" finding provides a strong, if inconclusive, clue that

Congress was acting outside of its Fourteenth Amendment enforcement authority in applying the ADA to the States.

The Equal Protection Clause does afford some protection to disabled individuals. "[A]rbitrary and irrational discrimination violates the Equal Protection Clause under even [the] most deferential standard of review." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988). On the other hand, a *facially neutral* law or policy that adversely impacts the disabled will violate equal protection only where the law or policy "was promulgated . . . *because of*, not merely in spite of, its adverse impact on" disabled persons. *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 276 (6th Cir. 1994) (citing *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979)). "'"Discriminatory purpose" . . . implies more than intent as volition or intent as awareness of consequences.'" *Horner*, 43 F.3d at 276 (quoting *Feeney*, 442 U.S. at 279).

Our comparison of Title II to the Fourteenth Amendment equal protection guarantee leads us to conclude that Title II of the ADA is "'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Kimel*, 120 S. Ct. at 647 (quoting *City of Boerne*, 521 U.S. at 532). Like the ADEA, Title II of the ADA prohibits a broad swath of conduct without permitting *any* inquiry into the State's legitimate interests. Indeed, Title II's

prohibition on "discrimination" is even more stringent than that under the ADEA, given that the ADEA incorporates statutory exceptions whereas Title II of the ADA does not. *See Kimel*, 120 S. Ct. at 647. We agree with the Seventh Circuit's observation that the ADA goes beyond Congress's power under the Constitution in that

> State practices affecting the disabled do not receive the same presumption of legitimacy that they do under rational basis scrutiny. . . . [U]nder the ADA it is no longer the case that any rational reason will support the State's action. . . . Moreover, while the Fourteenth Amendment allows the State to make broad generalizations about the disabled, the ADA "starts with a presumption in favor of requiring the [State] to make an individualized determination." . . . .
>
> As with the [ADEA] discussed in *Kimel*, the ADA shifts the burden in a disability discrimination case from the individual to the State, raises the level of judicial scrutiny from rationality review to a heightened level of scrutiny, and disallows the approximations and generalizations that are permitted for classes that otherwise receive only rational

basis protection.

Stevens v. Illinois Dep't of Transp., 210 F.3d 732, 738 (7th Cir. 2000) (quoting *Kimel*, 120 S. Ct. at 647), *petition for cert. filed*, 69 USLW 3022 (U.S. June 30, 2000) (No. 00-7). On this basis alone, we could find that the ADA "prohibits substantially more [State conduct] than would likely be held unconstitutional under the applicable equal protection, rational basis standard." *Kimel*, 120 S. Ct. at 647.

We need not rely on the prohibitive component of Title II alone, however, because Title II extends well beyond it. Although Title II's explicit provisions merely *prohibit* public entities from excluding disabled individuals from participating in, or enjoying the benefits of, public services, it contains another implicit requirement. Specifically, Title II defines a "qualified individual with a disability" to mean:

> an individual with a disability who, *with* or without *reasonable modifications* to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, *or the provision of auxiliary aids and services*, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public

entity.

42 U.S.C. § 12131(2) (emphasis added). In effect, this definition imposes an affirmative obligation on public entities to accommodate disabled individuals. It is this obligation that lies at the heart of this case, as Popovich claims that the DRD denied him appropriate auxiliary aids to accommodate his hearing disability.

There is no statutory exception to Title II's duty to accommodate; the only exceptions appear in the enforcing agency's regulations. Even if we were convinced that regulations can save an otherwise invalid statute--and we are not--resort to the regulations in this case is not helpful to the plaintiff. Like the limited statutory exceptions that could not save the ADEA in *Kimel*, the regulatory exceptions in this case result in a scheme that imposes far more restrictions on state action than would be the case under a rational basis standard. For example, the regulations excuse a public entity from the obligation to modify policies, practices or procedures only if the entity "can demonstrate that making the modifications would *fundamentally alter* the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7) (emphasis added). Similarly, with regard to communication aids, the regulations adopt a "fundamental alteration" exception and an "undue financial and administrative

burdens" exception. 28 C.F.R. § 35.164. The public entity bears the burden of proving such alteration or burdens "after considering all resources available for use in the funding and operation of the service, program, or activity." *Id.* We note that a plurality of the Supreme Court, in a recent Title II case involving the right of disabled individuals to community-based treatment, has interpreted section 35.130(b)(7) to permit more flexibility than its plain language might suggest. *Olmstead v. Zimring*, 119 S. Ct. 2176, 2188-90 (1999). In *Olmstead*, the Court construed the "fundamental alteration" exception to "allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." *Id.* at 2189. However, as we explain below, even this liberal interpretation of one of the accommodation exceptions, like the ADEA's BFOQ defense, imposes a burden on the States that is "'significantly different'" from a rational basis test. *See Kimel*, 120 S. Ct. at 647 (quoting *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 421 (1985)).

The accommodation requirement, with its limited regulatory exceptions, reaches far beyond conduct likely to violate the Equal Protection Clause. Accommodation requires special treatment for the disabled in situations where facially neutral policies and practices adversely impact the disabled

due to their physical or mental impairments. Such action may be constitutionally required only in cases where the State adopts the challenged policy *because of*, not in spite of, the limitations of the disabled. Title II makes no attempt to distinguish between those neutral policies that violate the Equal Protection Clause and those that do not. This case illustrates the point. There was no evidence that the DRD designed its courtroom with the intention of discriminating against disabled individuals; that the absence of an FM amplification system or real-time captioning in the courtroom was due to a discriminatory motive; or that the DRD refused to provide real-time captioning because of Popovich's hearing loss. Popovich, therefore, could not succeed in a claim under the Equal Protection Clause. Title II provided more relief in this case than would otherwise be available under the Fourteenth Amendment.

In this sense, the accommodation requirement under the ADA is reminiscent of the ill-fated RFRA.

> What the RFRA did for religion, the ADA does for disabilities. In neither situation does the Constitution forbid neutral laws or practices that create disparate impacts; in neither situation does the Constitution require accommodation. . . . [Indeed,] there is a countervailing difference that makes the ADA

> the more adventuresome. The Free Exercise Clause forbids all intentional discrimination against religious practices; the Equal Protection Clause has no similar rule about disabilities. Rational discrimination against persons with disabilities is constitutionally permissible in a way that rational discrimination against religious practices is not. This makes the ADA harder than the RFRA to justify under § 5 . . . . *[N]o one* believes that the Equal Protection Clause establishes the disparate-impact and mandatory-accommodation rules found in the ADA.

Erickson v. Board of Governors of State Colleges and Univs. for Northeastern Illinois Univ., 207 F.3d 945, 951 (7th Cir. 2000), *petition for cert. filed*, 68 USLW 3003 (U.S. June 26, 2000) (No. 99-2077).

This does not end our inquiry, however. The Supreme Court has made clear that Congress has authority under the Fourteenth Amendment to enact broad prophylactic legislation, even if it regulates a substantial amount of conduct that does not run afoul of the Constitution. We must carefully distinguish between valid prophylactic legislation

and legislation that substantively alters the scope of constitutional guarantees. In *Kimel*, the Court made very clear that Congress may overstep its bounds in enacting broad remedial legislation when the legislative history fails to evidence significant constitutional violations requiring such "powerful remedies." *Kimel*, 120 S. Ct. at 648.

We have thoroughly reviewed the legislative history of the ADA. Despite its volume, we find that the legislative history of this statute suffers from the same deficiencies the Court identified in *Kimel*. There is virtually no evidence that the States have engaged in a widespread pattern of *unconstitutional* discrimination against the disabled in the provision of public services. The only relevant evidence "consists almost entirely of isolated sentences clipped from floor debates." *Id.* at 649. *See Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988; Hearing Before the Subcommittee on Select Education of the House Committee on Education and Labor*, 100th Cong. 100-109, at 50 (1988) (statement of Ilona Durkin, Connecticut Traumatic Brain Injury Ass'n, Inc.) ("State agencies discriminate against people with traumatic brain injury because of their disability"), *reprinted in* 2 Bernard D. Reams, Jr., *et al.*, Disability Law in the United States: A Legislative History of the Americans with Disabilities Act of 1990 Public Law 101-336 (1992) [hereinafter ADA Legislative History]; and *Americans with Disabilities Act of 1989; Hearings Before the*

Committee on Labor and Human Resources and the Senate Subcommittee on the Handicapped, 101st Cong. 101-156, at 658 (1989) (appendix) (prepared statement of Laura Oftedahl, Director of Public Affairs, Columbia Lighthouse for the Blind) (describing barriers to accessing information from public agencies in braille, large-print, recorded, or computer-accessible form), *reprinted in* 2 ADA Legislative History; United States Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities, at 40, 168 (Sept. 1983) (stating that disabled individuals have been denied the right to vote, hold public office, obtain a driver's license or hunting license, serve on juries, and marry).

Congress did include some specific findings in the ADA itself identifying discrimination against the disabled as a "serious and pervasive social problem" and stating that discrimination against the disabled affects "access to public services." 42 U.S.C. § 12101(a)(2)-(3). In our view, these generalized and unsupported "findings" do not cure the dearth of evidence in the legislative history. We understand that some courts have been willing to overlook this deficiency and rely on Congress's express finding that discrimination against the disabled is pervasive. *Dare v. California*, 191 F.3d 1167, 1174 (9th Cir. 1999), *petition for cert. filed*, 68 USLW 3566 (U.S. Feb. 24, 2000) (No. 99-1417); *Muller v. Costello*, 187 F.3d 298, 309 (2d Cir. 1999); *Coolbaugh v. Louisiana*, 136 F.3d 430, 437 (5th Cir.), *cert. denied*, 525 U.S. 819 (1998).

We disagree with this approach for several reasons. First, the Supreme Court in *Kimel* rejected the United States' reliance on evidence of substantial age discrimination in the private sector and expressed skepticism as to whether such evidence could be extrapolated to the States. *Kimel*, 120 S. Ct. at 649. Second, the legislative history demonstrates that Title II, in significant part, was designed to achieve consistency between federally funded programs, already covered by the Rehabilitation Act of 1973, and other government programs. *See* S. Rep. No. 101-116, at 12 (1989), *reprinted in* 1 ADA Legislative History; H.R. Rep. No. 101-485, part 2, at 37 (1990), *reprinted in* 1 ADA Legislative History. This is not an objective compelled by the Constitution. Congress's desire to provide a "uniform remedy," placing States on the "same footing" as other entities governed by federal law, does not fall within its Fourteenth Amendment enforcement powers. *Florida Prepaid*, 119 S. Ct. at 2211. Third, the evidence of "discrimination" in the legislative history, like Congress's references to "discrimination" in its statutory findings, is not confined to *unconstitutional* discrimination; for the most part, the isolated evidence of "discrimination" fails to distinguish neutral laws and policies that adversely impact disabled individuals for benign, constitutional reasons from those specifically intended to disfavor disabled individuals. Congress's failure to recognize this distinction between unconstitutional and constitutional discrimination, and to incorporate it into the statute, leaves the accommodation

remedy far out of proportion to any identified constitutional violation.

At best, "Congress appears to have enacted this legislation in response to a handful of instances of state ["discrimination" against the disabled] that do not necessarily violate the Constitution." *Id.* at 2210. Congress's remedial authority does not extend so far. Neither the ADA's legislative history, nor Congress's "findings" embodied in the statute itself, responds to a "history of 'widespread and persisting deprivation of constitutional rights.'" *Id.* (quoting *City of Boerne*, 521 U.S. at 526).

We know that in holding that Congress exceeded its authority by abrogating States' sovereign immunity under the ADA, we depart from the view expressed by several of our sister circuits. *See Martin v. Kansas*, 190 F.3d 1120 (10th Cir. 1999) (upholding Title I as applied to the States); *Muller*, 187 F.3d 298 (2d Cir. 1999) (same); *Kimel v. State Bd. of Regents*, 139 F.3d 1426 (11th Cir. 1998) (same), *aff'd on other grounds*, 120 S. Ct. 631 (2000); *Coolbaugh*, 136 F.3d 430 (5th Cir. 1998) (upholding Title II as applied to the States); *Clark v. California*, 123 F.3d 1267 (9th Cir. 1997) (same). *Cf. Walker v. Snyder*, 213 F.3d 344 (7th Cir. 2000) (holding that Congress exceeded its authority in applying Title II to the States); *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (*en banc*) (same); *Erickson*, 207 F.3d 945 (7th Cir.

2000) (striking Title I of the ADA as applied to the States). However, all but one of the circuits that have upheld application of the ADA to the States did so before the Supreme Court decided *Kimel*, a decision we believe "changes everything" and compels our holding today. The Second Circuit is the only circuit that has continued to apply the ADA to the States in the aftermath of *Kimel*, and it has done so without conducting any new analysis in light of that authority. *See Jackan v. New York State Dep't of Labor*, 205 F.3d 562 (2d Cir. 2000); *Kilcullen v. New York State Dep't of Labor*, 205 F.3d 77 (2d Cir. 2000). In addition, the Fifth Circuit recently acknowledged that *Kimel* may undermine its holding in *Coolbaugh*. *Neinast v. Texas*, 217 F.3d 275, 280 n.29 (5th Cir. 2000).

In summary, we hold that Congress exceeded its enforcement authority under the Fourteenth Amendment in applying Title II to the States. Title II's strict prohibition on discrimination, along with the accommodation requirement, regulates far more conduct than the Equal Protection Clause prohibits. Moreover, the scarce evidence of unconstitutional discrimination by the States in the provision of public services leads us to conclude that Title II was "an unwarranted response to a perhaps inconsequential problem." *Kimel*, 120 S. Ct. at 648-49.

We do not mean to suggest that the problems endured

by the disabled are inconsequential. To the contrary, we do not doubt that disabled individuals face considerable obstacles in today's society. There is no question that the ADA is an effective tool for achieving its laudable goals to ensure "equality of opportunity, full participation, independent living, and economic self-sufficiency" for disabled individuals. 42 U.S.C. § 12101(a)(8). But admirable, even desirable goals are not always consistent with constitutional limitations; in such cases, we are bound to follow the constraints of the Constitution.

3. *ADA Retaliation*

Unfortunately, a poorly drafted verdict form prevents us from resting our holding entirely on Title II of the ADA, although neither party has identified this fact. The general verdict form permitted the jury to award damages if it found that the defendants had violated Title II "and/or" the ADA's retaliation provision. Since the verdict form makes it impossible for us to conclude that the award was based *solely* on Title II, we must consider whether a verdict under the ADA's retaliation provision can stand. We find that it cannot.

The ADA provides that "[n]o person shall discriminate against any individual because such individual . . . made a charge . . . or participated in any manner in an investigation . . . under this chapter." 42 U.S.C. § 12203(a).

To establish a retaliation claim, a plaintiff must show: "(1) that he engaged in protected activity; (2) that he suffered adverse . . . action; and (3) that a causal connection existed between the protected activity and the adverse action." *Penny v. United Parcel Serv.*, 128 F.3d 408, 417 (6th Cir. 1997). Popovich's alleged "protected activity" was the complaint he filed with the DOJ. According to DOJ regulations, "[a]n individual who believes that he or she . . . has been subjected to discrimination on the basis of disability by a public entity may . . . file [such] a complaint." 28 C.F.R. § 35.170(a). Given our holding that the State of Ohio, including the DRD, is immune from suit for "discriminating" in violation of Title II, we hold that Popovich's complaint to the DOJ did not constitute a "protected activity." Therefore, we reverse the district court's judgment entering the jury's award of compensatory damages.

4. *Injunctive Relief*

In closing, we note that the district court did not specify its source of authority for imposing injunctive relief. Thus, it is unclear whether the court was purporting to act under 42 U.S.C. § 1983 or the ADA. In either case, the injunctive relief cannot stand. The DRD was immune from suit under the ADA for the reasons discussed above, and it is not a "person" subject to suit under section 1983. *Mumford*, 105 F.3d at 267.

III.

For the reasons stated herein, we **REVERSE** the judgment of the district court and **REMAND** to the court with instructions that the jury verdict be **VACATED** and the injunction be dissolved.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO.: 1:95 CV 0684
Magistrate Judge James S. Gallas

JOSEPH POPOVICH, Plaintiff

vs.

CUYAHOGA COUNTY, et al., Defendants

AMENDED JUDGMENT ENTRY

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It is ordered and adjudged that plaintiff is awarded compensatory damages in the sum of $400,000.00 against defendant Cuyahoga County Common Pleas Court Domestic Relations Division, for violation of Title II of the Americans with Disabilities Act by denial of benefits of services, programs, or activities against plaintiff on the basis of his disability, and/or retaliation against him for asserting his rights under the Americans with Disabilities Act. Judgment is granted in favor of defendant Cuyahoga County and it is dismissed from this action. This case is concluded and appealable, and the matter terminated pursuant to Rule 58 of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

James S. Gallas
United States Magistrate Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO.: 1:95 CV 0684
Magistrate Judge James S. Gallas

JOSEPH POPOVICH, Plaintiff

vs.

CUYAHOGA COUNTY, et al., Defendants

MEMORANDUM OPINION AND ORDER
(Docket No. 79)

Filed 1998 NOV 19 PM 4:36 AKRON

Defendants have moved for new trial, judgment as a matter of law, and for remititur of the jury award pursuant to Rules 59 and 50(b) respectively of the Federal Rules of Civil Procedure. In this action the jury found both Cuyahoga County and the Cuyahoga County Court of Common Pleas Domestic Relations Division monetarily liable for violating Title II of the Americans with Disabilities Act of 1990 [ADA] and awarded compensatory damages against defendants in the amount of $400,000.00. Following jury trial, judgment was

entered granting injunctive relief against both defendants under 42 U.S.C. §1983 for violation of plaintiff, Joseph M. Popovich's civil rights as alleged in the third count of the amended complaint which sought prospective relief.

A motion for new trial under Rule 59(a) must be denied, "if the verdict is one that reasonably could be reached, regardless of whether the trial judge might have reached a different conclusion were he the trier of fact." *Powers v. Bayliner Marine Corp.*, 83 F.3d 789, 796 (6th Cir. 1996), *cert. denied*, 117 S.Ct. 41, 136 L.Ed.2d 375 (1996); *Wayne v. Village of Sebring*, 36 F.3d 517, 525 (6th Cir. 1994), *cert. denied*, 514 U.S. 1127, 115 S.Ct. 2000, 131 L.Ed.2d 1001 (1995).

A motion for judgment as a matter of law or alternative motion for new trial under Rule 50(b)'s standard of review may vary depending on whether the matter before the district court is brought under diversity or as a federal question. In a diversity case, the defendant's Rule 50 motion is reviewed under the standards of review used by the courts of the state whose substantive law governs. *Morales v. American Honda Motor Co., Inc.*, 151 F.3d 500, 506 (6th Cir. 1998); *K & T Enterprises, Inc. v. Zurich Insurance Co.*, 97 F.3d 171, 176 (6th Cir. 1996). Since this case involved claims under the ADA and §1983 which are federal questions, the Sixth Circuit's standard of review governs which is as

follows:

> In a federal question case, the standard of review for a Rule 50 motion based on sufficiency of the evidence is identical to that used by the district court. The evidence should not be weighed. The credibility of the witnesses should not be questioned. The judgment of this court should not be substituted for that of the jury. Instead, the evidence should be viewed in the light most favorable to the party against whom the motion is made, and that party given the benefit of all reasonable inferences. The motion should be granted, and the district court reversed, only if reasonable minds could not come to a conclusion other than one favoring the movant. *Wehr v. Ryan's Family Steak Houses, Inc.*, 49 F.3d 1150, 1152 (6th Cir. 1995).

K & T Enterprises, Inc., 97 F.3d at 175-76.

Reversal of judgment may only occur when no reasonable juror could find in favor of the nonmoving party. *Aparicio v. Norfolk & Western Ry. Co.*, 84 F.3d 803,806 (6th Cir. 1996); *Cook v. American Steamship Co.*, 53 F.3d 733,

740 (6th Cir. 1995). However, as with motions for new trial under Rule 59, the district court does not weigh the evidence, evaluate the credibility of the witnesses or substitute its judgment for that of the jury. *Black v. Zaring Homes, Inc.*, 104 F.3d. 822, 825 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 172, 139 L.Ed.2d 114 (1997). The court, rather, must weigh the evidence in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences. *Id.*[1]

Finally, a motion for remititur on the basis of the amount of the award will be denied "if the verdict is within the range of proof and the jury was properly instructed." *American Anodco, Inc. v. Reynolds Metals Co.*, 743 F.2d 417, 424 (6th Cir. 1984).

I.

Defendants argue that the facts and circumstances of this case clearly involve the Domestic Relations Division of

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[1] The party moving post-judgment for judgment as a matter of law must have previously moved for judgment as a matter of law before submission of the case to the jury. See Rule 50(a) and (b); *Libbey-Owens-Ford Co. v. Insurance Co. of North America*, 9 F.3d 422, 425 n. 2 & 3 (6th Cir. 1993) (further noting amendment of former motion for judgment n.o.v.).

the Common Pleas Court but that the role of Cuyahoga County itself was never clearly established in plaintiff's case. As stipulated by the parties, both the State of Ohio and Cuyahoga County provide funding for the Cuyahoga County Common Pleas Court, Domestic Relations Division. However, defendants correctly maintain that in a discrimination case funding alone cannot be a basis for liability of a party.

A. Liability Under ADA Claims:

The evidence produced by plaintiff, Mr. Popovich, established that on August 24, 1992 a domestic violence petition under Ohio Rev. Code §3113.31 had been filed against plaintiff by his ex-wife, and the matter came for *ex parte* hearing on August 25, 1992. Mr. Popovich and counsel were present in the courtroom, but were not permitted to participate by order of Domestic Relations Division Judge Fisher. The *ex parte* proceeding on August 25, 1992 was followed by the judge's temporary protection order which awarded plaintiffs ex-wife temporary custody of the minor child of the plaintiff, Lauren Popovich, and further enjoined plaintiff and restrained him from approaching, entering or attempting to enter the child's school and/or daycare facilities and residence. Further pursuant to the statute, §3113.31, Judge Fisher set the matter for hearing with Mr. Popovich's participation on September 3, 1992 before Referee Fuss.

Meanwhile, pursuant to Judge Fisher's order, Mr. Popovich's daughter Lauren was removed from his home and he was prohibited from having any contact with her.

This domestic violence petition was one of two matters pending in the Common Pleas Court's Domestic Relations Division. Plaintiff had previously initiated a custody proceeding in the Domestic Relations Division which had progressed to hearing on August 11, 1992 on cross-motions over custody and visitation rights involving his daughter. Plaintiff complained that he was having trouble hearing certain words and tones and could not participate actively in the proceedings.

Referee Fuss ordered the plaintiff to contact an outside agency regarding his hearing difficulty and plaintiff contacted the Cleveland Hearing and Speech Center. At the center he was informed of the ADA and the court's obligation to provide auxiliary aids and services. An audiologist from the Center contacted Cuyahoga County's ADA court administrator, Richard Slosar, to attempt to obtain auxiliary aids and services for plaintiff. In turn, Mr. Slosar, on August 20, 1992, contacted Referee Fuss that an allegation of discrimination had been raised over the court's compliance with the ADA and the referee brought this to Judge Fisher's attention. On August 21, 1992 Referee Fuss announced that the custody proceedings would not go forward until the issue

of ADA violations were resolved. Plaintiff was ordered to undergo an audiological examination at his own expense.

On August 25, 1992, the same day as the *ex parte* domestic violence petition hearing was conducted, a hearing in the custody matter was held concerning the audiological examination where the parties stipulated (without plaintiff's participation) that plaintiff had a hearing impairment that required "speech augmentation equipment." The audiologist had recommended an FM transmitter system with pass around microphone. Referee Fuss, however, decided to use an FM transmitter system with a centrally located microphone.

Two days later on August 27, 1992, Judge Fisher declared a mistrial and voluntarily removed himself from the case "to preclude any impropriety, or the appearance of the conflict of interest" on his part. Referee Fuss was also removed from the case, and the case was transferred to Judge Flanagan for reassignment.

On September 3 until October 23, 1992 hearings were held on the domestic violence petition matter before Referee Schoby. These hearings continued the use of the FM system with a centrally located microphone and plaintiff used a headset. On October 23, 1992 plaintiff informed the referee that the extended use of the headset was causing an ear infection and it was no longer effective as a reasonable

accommodation. Plaintiff requested a continuance of 10 days and attached to the motion for continuance was a copy of a letter from plaintiff's physician stating that plaintiff had been under doctor's care for an ear infection which was expected to improve in three to four weeks. The continuance was granted in the domestic violence petition case and the matter reset to December 1, 1992.

On November 2, 1992 Judge Flanagan issued an order regarding plaintiff's hearing disability. The order stated that the auxiliary aids and services were required in the ongoing proceedings and that the services were obtained through the Cleveland Hearing and Speech Center. The case was reassigned to Judge Gallagher.

On November 10, 1992 in the domestic violence petition matter plaintiff moved for a decision, for the return of his daughter to his custody, and for visitation rights.

On December 1, 1992 plaintiff through counsel informed the court that he was still experiencing hearing difficulties and that the centrally located microphone FM transmitter system used during the early proceedings was no longer able to accommodate his changing hearing condition. Further, plaintiff requested the court to immediately reconvene the custody hearing so that the plaintiff could see his daughter, and he requested the court provide him with

computerized real time transcription of court proceedings or some other instantaneous transcription process. In response to this motion, Referee Schoby gave plaintiff two options. Plaintiff could either "withdraw his motion for a hearing accommodation and [the court] would proceed today with the continued hearing," or the referee could "schedule a hearing to determine the extent of his hearing disability and what, if any, accommodation needed to be made for that." Plaintiff through counsel informed the court that his hearing loss was so substantial he could not fully comprehend what was going on in a proceeding and he would rather proceed with the hearing on an appropriate accommodation. This hearing was scheduled for February 1, 1993.

On December 2, 1992 the Coordination and Review Section of the Department of Justice Civil Rights Division [CRS] notified the Domestic Relations Division that plaintiff had filed charges of discrimination and that an investigation had commenced. Plaintiff had contacted the Department of Justice around September 1992.

On January 25, 1993 the CRS made an inquiry to the Domestic Relations Division by telephone regarding the purpose of the February 1, 1993 accommodation hearing. Subsequently, the hearing that had been scheduled was canceled.

On February 19, 1993 the CRS instructed the court to recommence the proceedings without delay and not to use the pending investigation as a reason to delay the resolution of this matter. On March 23, 1993 the CRS again instructed the court to resume proceedings and not to use the investigation as a reason to delay the custody proceedings. On May 28, 1993 the CRS sent a letter to the court requesting a response to plaintiff's allegations on June 30, 1993. The Domestic Relations Division responded in a letter to the CRS as follows:

> If [the plaintiff] wishes to bring a different type of auxiliary aid with him to court, at his own expense, he is certainly free to do so. However, the court has met its legal obligations with respect to reasonable accommodation, and is prepared today as it was last December to proceed with all matters pending before it with the system it provided in the September and October hearings, or with any other system which [the plaintiff] wished to provide.

On June 1, 1993 plaintiff's ex-wife filed a motion requesting that the court continue the *ex parte* order from August 25, 1992. The plaintiff's ex-wife indicated that "the current federal investigation has effectively stayed on-going

proceedings." This matter had been transferred to the docket of Judge Anthony Russo after Judge Gallagher had been appointed to the position of administrative judge. On June 16, 1993 Judge Russo over plaintiff's objection extended the *ex parte* order indefinitely. His journal entry read as follows:

> The Motion of the Plaintiff for Exetension (sic) of Temporary Protection Order, filed, June 1, 1993, NO. 227320, be and is hereby GRANTED.

As a result, the full evidentiary hearing required by §3113.31, and which had been originally scheduled for September 1992, and the custody and domestic violence matters remained *in limbo* after December 1, 1992 when Popovich was given the option of either withdrawing his motion for hearing accommodation or proceeding with his case.

On March 31, 1994 the CRS informed the defendants that the court that an *ex parte* hearing or informal hearing could be held to determine the appropriate auxiliary aids, the nature of the plaintiff's disability and justifications for a different auxiliary aid. Judge Russo eventually scheduled a conference on August 1, 1994 to discuss the auxiliary aids. At this conference plaintiff's counsel provided Judge Russo medical information and pamphlets regarding the current

status of plaintiff's hearing deficiencies. The medical information reflected that the plaintiff had sloping mild to moderately severe hearing loss in both ears, and severe skin condition which seemed to be continuous into his ear canals.

On August 12, 1994 plaintiff's counsel wrote to Mr. Frank Pokorny, Court Administrator, with the name, address and phone number of a court reporting firm that had quoted him rates for real time transcription service and supplied those rates.

On September 12, 1994 the CRS wrote a letter to Mr. Patrick Murphy, Assistant Prosecuting Attorney for Cuyahoga County requesting that the Domestic Relations Division hold a conference no later than September 23, 1994 to set the date to resume the proceedings.

On October 7, 1994 the county prosecuting attorney responded to CRS, stating that Judge Russo had decided to order real time transcription service for the plaintiff, and that an attorneys' conference had been scheduled for October 13, 1994. On October 7, 1994 Judge Russo had in fact ordered real time transcriptions for plaintiff. However, the Domestic Relations Division never provided real time transcription for Mr. Popovich and never set a hearing for real time transcription to be used. At the conference Judge Russo informed counsel that Referee Schoby would be unable to

continue the case and counsel had the option to either proceed with a transcript prepared from the prior proceedings and waive any appeal rights based on the use of the transcript or begin the case anew. Plaintiff's counsel raised the issue of denial of access and contact with plaintiff's daughter since August 1992 pursuant to the *ex parte* temporary protection order. Subsequently on October 13,1994, Judge Russo ordered the guardian ad litem, "shall have authority, subject to objection which can be made to this court by proper motion, to arrange visitation between Lauren (minor child) and Joseph Popovich [and] same shall not be considered a violation of the temporary protection order previously issued by this court."

After this lawsuit was filed in March 1995 no further action was taken in either custody matter until more recently when Judge Cirigliano was appointed as visiting judge in early 1997. Upon being appointed Judge Cirigliano held a brief hearing and brought the parties together to resolve both the domestic violence and custody issues. Finally in December of 1997 plaintiff obtained custody of his daughter.

Plaintiff argues that Cuyahoga County Court of Common Pleas may be held liable for compensatory damages resulting from discrimination perpetrated against the plaintiff by the Domestic Relations Division and that the county which established and maintained the court system may be held

liable for its failure to insure equal access to the services provided by the county including the court system.

From these facts the jury could not reasonably find that Cuyahoga County itself was responsible for discrimination or retaliation under Title II of the ADA. Although the CRS did communicate with Cuyahoga County primarily through its office of prosecuting attorney, the prosecuting attorney merely passed on the information from the CRS to the court. There is no evidence that the prosecuting attorney took an active role in this matter. The Domestic Relations Division made the decisions.

Plaintiff is incorrect in his contention that the county established the court system. The Cuyahoga County Court of Common Pleas was established pursuant to Article IV, §4 of the Ohio Constitution and is further governed by statutes as set forth by the state legislature of Ohio in Ohio Revised Code Chapters 2301 through 2337. It clearly was not established by the Cuyahoga County Commissioners.

Moreover, the county commissioners have limited discretion when it comes to maintaining a common pleas court, and must appropriate funds as required by state law. The commissioners must provide appropriations for the physical facility of the Common Pleas Court. See Ohio Rev. Code §305.22, §307.01; *State ex rel. Bittikofer v. Babst*, 97

Ohio St.64, 15 Ohio Law Rep. 44, 119 N.E. 136 (1917). When it comes to operating expenses, "[a] court of common pleas in this state has the inherent authority to require funding which is reasonable and necessary to the administration of the court's business." *State ex rel. Weaver v. Lake County Bd. of Comm.*, 62 Ohio St.3d 204, 205, 580 N.E.2d 1090, 1092 (1991); and see *State ex rel. Morley v. Lordi*, 72 Ohio St.3d 510, 511-12, 651 N.E.2d 937, 939 (1995). Thus the common pleas court is a state, not county, created entity which may mandate local county funding. Likewise, the commissioners have no authority over judicial salaries. These are set by the state legislature pursuant to Ohio Revised Code Chapter 141. The commissioners have no authority over the common pleas court's jurisdiction. The jurisdiction of the common pleas court is set by the Ohio Constitution and determined by the state legislature. Ohio Constitution Art. IV, §18; *State ex. rel Stanton v. Powell*, 109 Ohio St. 383, 142 N.E. 401 (1924). Based on the foregoing law and the evidence submitted in the case, there is no legal nexus, nor could the jury reasonably find any factual nexus between the ADA violations and the county. Plaintiff has not shown that the county excluded or denied plaintiff of the benefits of services, programs or activities as required to prevail under 42 U.S.C. §12132.

On this point, plaintiff's reliance on *Livingston v. Guice*, 68 F.3d 460 (Table) 1995 WL 610355 (4th Cir. Oct. 18, 1995) is misplaced. Under arguably similar

circumstances, the Fourth Circuit held that a North Carolina Superior Court Judge was "the State's representative" based on facts that the State Superior Court was created by the State Constitution, held statewide jurisdiction, and had its judge's salaries determined by the state legislature, *Guice* fails to demonstrate any precedent for imposing liability on the county-level of local government.

Finally plaintiff contends that there is a nexus between the county and the actions of the Domestic Relations Division by way of the county's ADA coordinator. In support of this argument plaintiff states that the ADA coordinator "informed Referee Gregory C. Fuss... that an allegation of discrimination had been raised relative to the court's compliance with the [ADA]" (Brief at 3). However, merely informing the court does not equate with exclusion or denial of benefits as required to prevail under §12132. The coordinator took no adverse action.

Consequently, there is no evidence supporting the jury's verdict against Cuyahoga County and judgment must accordingly be amended to reflect this pursuant to Rule 50(b) of the Federal Rules of Civil Procedure.

B. Liability Under 42 U.S.C. §1983:

Cuyahoga County admits that it may be held liable

under 42 U.S.C. §1983 for violations of civil rights due to the acts or omissions of its policy-making officials if they establish policies or acquiesce in a custom or practice that deprived plaintiff of rights, privileges or immunities. See *Monnell v. Dept. of Social Services of the City of New York*, 436 U.S. 658, 92 S.Ct 2018, 56 L.Ed.2d 611 (1978). It argues that the jury was not presented instructions on the §1983 claim and plaintiff's failure to offer instructions on a claim constitutes waiver of the claim citing *Knight v. Caldwell*, 970 F.2d 1430 (5th Cir. 1992), *cert. denied*, 507 U.S. 926 (1993).

It is remarkable that the county would raise such an argument. The amended complaint clearly provided that compensatory damages were being sought only under the ADA claims. The §1983 claim sought only prospective injunctive relief to compel the defendants to provide reasonable accommodation, to enjoin the defendants from engaging in further retaliation against plaintiff, and to compel the defendants to rule on the pending domestic relations cases. Since the matter sought injunctive relief it follows that this matter was not submitted to the jury. It was a matter to be tried to the bench. Apparently defendants do not understand this point, although they appeared to grasp the significance of the §1983 claim at trial. At the close of trial on April 6, 1998 the parties represented that a stipulated entry would be forthcoming. (See TR. pg. 1-4, Docket No. 96). Both counsel for plaintiff and the defendants believed that the

injunctive relief sought in the third count of the amended complaint was no longer an issue due to Judge Russo's order from October 1994 that the Domestic Relations Division would provide plaintiff with real time transcription services. This court suggested the parties prepare a stipulated entry as to that, and counsel agreed to submit the stipulated entry by April 15, 1998 (TR. pg. 4, Docket No, 96). Thus, there was no bench trial on this matter due to the mutual representation of agreed resolution in this final matter.

Evidently a proposed judgment entry was later sent in this matter addressed to the Magistrate Judge personally. Unfortunately this letter and proposed judgment entry did not reach the Magistrate Judge's attention and upon the court's inquiry to plaintiff's counsel, Mr. Haber, he submitted the proposed judgment entry which was signed and filed by the court on July 28, 1998. The entry is not stipulated, contrary to the earlier representations in open court. According to Mr. Haber he was unsuccessful in obtaining the stipulated entry from defendants' counsel although defendants' counsel had earlier agreed to such.

With respect to the §1983 claim, there was no judgment on this claim when defendants filed their motion for new trial, judgment as a matter of law, and remititur. Copies of a prior judgment entry identical to the entry filed on July 28, 1998 were circulated to defendants and no objection to the

proposed judgment entry with respect to plaintiff's claim for injunctive relief was made known to the court. Had the parties submitted their proposed judgment entry on or before April 15, 1998, as agreed, then at least the timing of defendants' motion filed on April 23, 1998 would have been sensible. However notwithstanding the premature filing of the motion, no objections were anticipated because defendants had represented there could be no problem submitting an agreed proposed entry with respect to this claim and defendants remained silent until they filed a premature notice of appeal on August 27, 1998 (See Docket No. 97), rather than renewing the motion for new trial or judgment as a matter of law. Accordingly, since there was no judgment entered on plaintiff's §1983 claim when the motion was filed, defendant's premature motion must be denied.

II.

Defendants further seek new trial or judgment as a matter of law based upon what they contend was a trial court error. Defendants mistakenly assert that, "This court early in the trial instructed the jury that the August 25, 1992 [temporary protection order] was properly granted." The fact is that after discussions with defendants' counsel the court did inform the jury on defendants' request to "admonish" the jury.

Ladies and gentlemen of the jury, the Court

> will admonish you with respect to the *ex parte* hearing. It's a perfectly lawful procedure under the law of Ohio. That's all you're to consider. We will now proceed with the first witness. (TR. 114).

This issue carried some importance because in plaintiff's trial brief he maintained that the ADA was violated by the defendant's conduct including the evidentiary hearing on August 25, 1992 held without his participation or as he phrased it, with the participation by opposing counsel." In relation to this argument, plaintiff claimed a violation of 28 C.F.R. §35.160 also. This matter was the topic of the court's order with respect to motions in limine (Docket No. 62). The court stated, "While these allegations constitute historical events that are part of this case, there is no basis for holding the position that the conducting of an evidentiary hearing on August 25, 1992 with participation of opposing counsel violates the Americans with Disabilities Act. Testimony concerning the events that transpired on August 25, 1992, though, is admissible."

Defendants contend that the jury was improperly permitted to consider an award of damages for the time period "when a valid order of the Domestic Relations Court was in effect which limited plaintiff's contact with his daughter." (Motion for New Trial at 4). In effect, defendants argue that

the jury should have been instructed not to consider the time period beginning August 25, 1992 to the time period when the temporary protection order expired. Defendants further requested an instruction that "the orders of the Domestic Relations Court should be deemed valid by the jury."[2] Defendants now for the first time contend that the review of state court decisions by a jury is improper citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983) and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

The *Rooker-Feldman* doctrine arose from two cases interpreting the language of 28 U.S.C. §1257 and its predecessor. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U. S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). "In each case, the Supreme Court considered whether a federal district court could exercise jurisdiction to determine the validity of a state court judgment. The Supreme Court held that federal district courts 'do not have jurisdiction... over challenges to state court

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2 Although the court ordered proposed instructions be submitted prior to trial, defendants had not requested an instruction on this point. Further, defendants misstated to the court that they suggested a special interrogatory to the jury on this point, (Transcript at 10-11, Docket No. 102). However, no such request had been made. See Defendants' Proposed Jury Instructions pg. 7, Docket No. 47).

decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." *Catz v. Chalker*, 142 F.3d 279, 293 (6th Cir. 1998); *and see United States v. Owens*, 54 F.3d 271, 274 (6th Cir. 1995), *cert. dismissed*, 516 U.S. 983 (1995). Phrased another way, this doctrine bars "a party losing in state court ... from seeking what in substance would be appellate review of the state judgment in United States District Court based on the losing party's claim that the state judgment itself violates the loser's federal rights..." *Johnson v. De Grandy*, 512 U.S. 997, 1005-06, 114 S.Ct. 2647, 2654, 129 L.Ed.2d 775 (1994).

As recently explained in *Catz*, there are two prerequisites to this jurisdictional rule. First, "[i]n order for the *Rooker-Feldman* doctrine to apply to a claim presented in federal district court, the issue before the Court must be ['inextricably intertwined'] with a claim asserted in a state court proceeding." *Catz*, 142 F.3d at 293; *Keene Corp. v. Cass*, 908 F.2d 293, 296 (8th Cir. 1990).

> Under the Feldman doctrine,
> the federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated

> upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.
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> [*Keene Corp.*,] 908 F.2d at 296-97 (quoting *Penzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25, 107 S.Ct. 1519, 1533, 95 L.Ed.2d 1 (1987) (Marshall, J., concurring).

Catz, 142 F.3d at 293.

Second, the action must present a general challenge to state law as opposed to a "specific grievance." Consequently, in order to circumvent the *Rooker-Feldman* doctrine, the plaintiff must show that his claims were not intertwined with the state court judgment and further that he presented a "specific grievance" that the law was invalidly -- even unconstitutionally -- applied in the plaintiffs particular case."

There is no question that the state court judgment cannot be attacked either directly or collaterally in the federal district court. *See Smith v. Wayne Weinberger P.C.*, 994 F.Supp. 418 (E.D. N.Y. 1998). Plaintiff did not directly or collaterally challenge the state court decisions removing custody of his daughter. First, plaintiff was bringing claims

which were not intertwined with the state court judgment. Plaintiff did not seek to reverse the temporary protection order issued by the Cuyahoga County Court of Common Pleas Domestic Relations Division. Second, plaintiff raised specific grievances of violations of the ADA. The rulings and judgment in a state court are not part of plaintiff's ADA claim. The temporary protection order made no reference to plaintiff's hearing difficulties and that order issued from an *ex parte* proceeding in which plaintiff did not participate. It is quite clear that plaintiff's claims are based on the events that occurred subsequent to that temporary protection order, and that plaintiff had a "specific grievance" as to federal laws that were violated in the process. The *Rooker-Feldman* doctrine does not preclude federal review of plaintiff's ADA and §1983 claims. Consequently, there was no error in permitting the jury to consider award of damages during the period of time when the order of Domestic Relations Division was in effect which prohibited plaintiff's contact with his daughter.

Defendants also argue that the award should have been limited because after the order extending the temporary protection order, plaintiff appealed the decision to the Eighth District Court of Appeals for Cuyahoga County and to the Ohio Supreme Court which declined to hear the appeal in February 1994. The fundamental flaw in this argument is that once jurisdiction was returned to the Common Pleas Court Domestic Relations Division, the court in October 1994

ordered that it provide plaintiff with real time transcription services but declined to set the matter for hearing. Defendants argue that the Domestic Relations Division never had occasion to use real time transcription because the court and the parties were engaged in settlement negotiations. This, however, was a question of fact which the jury resolved against the defendants. The jury could reasonably find that plaintiff had been deprived of the custody of his daughter from August 1992 to December 1997 (absent brief periods of court-supervised visitation for several years) that arose from an *ex parte* order and proceeding which never was concluded due to plaintiff's request for accommodation for his hearing impairment. The evidence certainly supports causation, contrary to defendants' arguments.

III.

Finally, defendants seek remititur of the jury award of damages maintaining that the damages of $400,000.00 were based upon passion and prejudice and expressed the jury's attempt to punish. Defendants contend that the damages do not reflect compensatory damages proven at trial and the size of the award is certainly a factor citing *Urseth v. City of Dayton*, 680 F.Supp. 1150, 1154 (S.D. Ohio 1987). The defendants believe the jury's determination of damages was "shocking" and manifested "plain injustice" so as to be grossly excessive as to be clearly erroneous citing *Neyer v.*

United States, 845 F.2d 641 (6th Cir. 1988), and *In re Lewis*, 845 F.2d 624, 635 (6th Cir. 1988). The jury's award, though, was much less than plaintiff had hoped to obtain.

As plaintiff points out, damages for pain and suffering for such a deprivation are difficult to determine. The jury awarded $400,000.00 to a man who it found was denied access to his daughter as a direct result of discriminatory acts of the Domestic Relations Division for a period of five years. Defendants substantiate no argument for a lesser award, other than their contention that this award was "shocking." "If [the court] had been cast in the role of triers of fact [it] might well have determined that a lesser award was reasonable or fair, but [it] is not free to judge this award ... in such a fashion." *Neyer*, 845 F.2d at 645.

CONCLUSION

Based on the foregoing, defendant's motion for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure is denied. Defendants' motion for a judgment as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure is granted in part and denied in part. Judgment will be amended with respect to the ADA claims to exclude Cuyahoga County. And finally defendants' motion for remititur is denied.

IT IS SO ORDERED.

James S. Gallas
United States Magistrate Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO.: 1:95 CV 684
JUDGE: GALLAS

JOSEPH POPOVICH, Plaintiff

v.

CUYAHOGA CTY, et al., Defendants

JUDGMENT ENTRY

Filed 1998 JUL 28 AM 11:38 AKRON

WHEREAS, Plaintiff has brought this action alleging the Defendants had violated his rights under Title II of the American with Disabilities Act, 42 U.S.C. §12131 et seq. Specifically, Plaintiff alleges that the Defendants failed to provide reasonable accommodation in the form of appropriate auxiliary aids to allow him to effectively participate in proceedings in two Domestic Relations cases in which he is a Defendant. Plaintiff further alleges that the Defendants retaliated against him for engaging in protected activity when he filed a complaint with the Department of Justice.

WHEREAS, Defendants deny the allegations and assert that they had made a good faith effort to

accommodate the Plaintiff and provide him with reasonable accommodation. Defendants further assert that they did not retaliate against the Plaintiff and that any decisions of the court are subject to Judicial Immunity.

WHEREAS, this matter was tried to a Jury and a verdict was rendered in favor of the Plaintiff on his claims of intentional discrimination, and for good cause shown, it is hereby ORDERED, ADJUDGED AND DECREED that,

1. Defendants shall provide Joseph Popovich with Real Time captioning for any proceeding that requires his active participation.

2. Defendants are enjoined from retaliating or discriminating against Joseph Popovich in connection with the provision of auxiliary aids and service in the Cuyahoga County Court of Common Pleas, Domestic Relations Division.

3. Defendants are enjoined from retaliating against Plaintiff in any other manner including unnecessarily delaying or staying the resolution of the underlying Domestic Relations cases.

4. This court shall retain jurisdiction to address any violation of this order from the date of issuance.

IT IS SO ORDERED.

MAGISTRATE JUDGE JAMES S. GALLAS

CC: Richard C. Haber
John P. O'Neil
Saundra Curtis Patrick
Steven W. Ritz

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO.: 1:95 CV 684
Magistrate Judge James S. Gallas

JOSEPH POPOVICH, Plaintiff

v.

CUYAHOGA COUNTY COURT OF COMMON PLEAS, et al., Defendants

JUDGMENT IN A CIVIL CASE

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_X_ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

__ Decison by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Plaintiff is awarded compensatory damages in the sum of $400,000.00 against defendants Cuyahoga County Common Pleas Court Domestic Relations Division and Cuyahoga County for violation of Title II of the Americans with Disabilities Act by denial of benefits of services, programs, or activities against plaintiff on the basis of his disability, and/or retaliation against him for asserting his rights under the American with Disabilities Act.

James S. Gallas, U.S. Magistrate Judge 4-13-98

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 126. EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

§ 12101. Congressional findings and purposes

(a) Findings. The Congress finds that--

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional

exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue

those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose. It is the purpose of this Act--

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

§ 12102. Definitions

As used in this Act:

(1) Auxiliary aids and services. The term "auxiliary aids and services" includes--

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability. The term "disability" means, with respect to an individual--

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State. The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

§ 12131. Definition

As used in this title:

(1) Public entity. The term "public entity" means--

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any

commuter authority (as defined in section 103(8) of the Rail Passenger Service Act [45 USCS § 502(8)]).

(2) Qualified individual with a disability. The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

§ 12132. Discrimination

Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202 [42 USCS § 12132].

§ 12134. Regulations

(a) In general. Not later than 1 year after the date of enactment of this Act [enacted July 26, 1990], the Attorney General shall promulgate regulations in an accessible format that implement this subtitle. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 223, 229, or 244 [42 USCS § 12143, 12149, or 12164].

(b) Relationship to other regulations. Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) shall be consistent with this Act and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794). With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 504.

(c) Standards. Regulations under subsection (a) shall include standards applicable to facilities and vehicles covered by this subtitle, other than facilities, stations, rail passenger cars, and vehicles covered by subtitle B. Such standards shall be consistent with the minimum guidelines and requirements

issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 504(a) of this Act [42 USCS § 12204(a)].

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV--CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

....

Section 5. The Congress shall havepower to enforce, by appropriate legislation, the provisions of this article.

CONSTITUTION OF THE UNITED STATES

AMENDMENT XI--SUITS AGAINST STATES

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

(2)

Supreme Court U.S.
FILED
JUL 15 2002
OFFICE OF THE CLERK

No. 01-1503

In The

Supreme Court of the United States

CUYAHOGA COUNTY COURT OF COMMON PLEAS,
DOMESTIC RELATIONS DIVISION,

Petitioner,

v.

JOSEPH M. POPOVICH
AND UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Title II of the ADA, 42 U.S.C. §§ 12131 to 12165 (2002), exceed Congress's enforcement authority under § 5 of the 14th Amendment, thereby failing to validly abrogate the state's 11th Amendment immunity from private damage claims?

2. Does the abrogation analysis of Title II of the ADA, 42 U.S.C. §§ 12131 to 12165 (2002), differ when an individual Title II claim is purportedly tied to due process concerns, rather than equal protection concerns?

ARGUMENT IN REPLY

Petitioner, Cuyahoga County Court of Common Pleas, Domestic Relations Division seeks this Court's review of whether Congress validly abrogated the state's 11th Amendment immunity by enacting Title II of the Americans with Disabilities Act. Concurrent with the filing of this Petition, the Respondent likewise filed a Petition for Certiorari, seeking review upon two issues:

1. Does a state waive its 11th Amendment immunity by its affirmative litigation conduct when it enters an appearance, defends on the merits for several years, seeks a judgment on the merits, and fails to raise the 11th Amendment immunity in the district court or in its original brief on appeal?
2. Did Congress exceed its authority under § 5 of the 14th Amendment when it enacted Title II of the Americans with Disabilities Act and abrogated the state's immunity from suit?

(See Petition for Writ of Certiorari of Joseph Popovich, Case No. 01-1517)

Subsequent to the filing of both Petitions for Writ of Certiorari (Case Nos. 01-1503 and 1-1517) this Court rendered the decision in *Lapides v. Board of Regents of the University System of Georgia*. The *Lapides* decision warrants the denial of the Domestic Relation's Court Petitions to the extent it require the Court to address the substantive arguments regarding congressional authority in abrogating a state's immunity from suit. Rather, the Court should grant Popovich's petition for certiorari on the issue of whether the state waived its immunity defenses by its

litigation conduct and remand the matter to the Sixth Circuit for consideration of the *Lapides* decision.[1]

In *Lapides*, this Court addressed the issue of whether the State waives its 11th Amendment immunity by virtue of its removal of state court proceedings to federal court. The Court's decision in *Lapides* clarifies confusion which had permeated 11th Amendment jurisprudence and was evident in the lower Court's decision. Justice Briar observed that "an interpretation of the 11th Amendment that finds waiver in the litigation conduct rests upon the amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness, and deny upon the State's actual preference or desire, which might, after all, favor selective use of 'immunity' to achieve litigation advantages." *Lapides*, slip opinion on p. 6, citing *Wisconsin Department of Corrections v. Schact*, 524 U.S. 381, 393 (1998) (Kennedy, J., concurring). In holding that the Court had waived the 11th Amendment immunity by virtue of its litigation conduct, Justice Breyer and the unanimous Court reaffirmed the viability of *Clark*, *Gunter* and *Gardner*[2] on the sounder line of authority with respect to when litigation conduct waives the 11th Amendment immunity. (*Lapides*, slip opinion at p. 8).

---

[1] The *Lapides* decision warrants the grant of Joseph Popovich's Petition for Certiorari in Case No. 01-1517 on issue Number 1. As set forth below, this Court should grant the Petition for Certiorari filed by Joseph M. Popovich on the issue of whether the State waives its 11th Amendment immunity by virtue of litigation conduct. The Court should then remand the matter back to the Sixth Circuit for further proceedings consistent with the *Lapides* decision.

[2] *Clark v. Barnard*, 108 U.S. 436 (1883); *Gunter v. Atlantic Coast Line*, 200 U.S. 273 (1906); *Gardner v. New Jersey*, 329 U.S. 565 (1947).

Based upon the conclusion of this Court in *Lapides*, it is submitted that it would be inappropriate to address the issue of Congress's authority to abrogate the 11th Amendment immunity under Title II of the Americans with Disabilities Act until the Sixth Circuit has properly addressed the issue of whether the Defendants in this case have waived their immunity by virtue of their failure to raise the issue until their reply brief on appeal in the Sixth Circuit. Accordingly, as it relates to this Petition for Writ of Certiorari, it should be denied.

CONCLUSION

In light of the intervening decision of this Court in *Lapides*, and the clear conduct of the Defendants in failing to raise an 11th Amendment immunity bar, the Petitioner's Writ of Certiorari should be denied.

Respectfully submitted,

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BRIEF FOR THE UNITED STATES

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Nos. 01-1503 and 01-1517

In the Supreme Court of the United States

COURT OF COMMON PLEAS OF OHIO, CUYAHOGA COUNTY, DOMESTIC RELATIONS DIVISION, PETITIONER

v.

JOSEPH M. POPOVICH AND THE UNITED STATES OF AMERICA

JOSEPH M. POPOVICH, PETITIONER

v.

COURT OF COMMON PLEAS OF OHIO, CUYAHOGA COUNTY, DOMESTIC RELATIONS DIVISION AND THE UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131-12165 (1994 & Supp. V 1999), is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals.

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In the Supreme Court of the United States

No. 01-1503

COURT OF COMMON PLEAS OF OHIO, CUYAHOGA COUNTY, DOMESTIC RELATIONS DIVISION, PETITIONER

v.

JOSEPH M. POPOVICH AND THE UNITED STATES OF AMERICA

No. 01-1517

JOSEPH M. POPOVICH, PETITIONER

v.

COURT OF COMMON PLEAS OF OHIO, CUYAHOGA COUNTY, DOMESTIC RELATIONS DIVISION AND THE UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The en banc opinion of the court of appeals (No. 01-1503 Pet. App. A1-A60) is reported at 276 F.3d 808.[1] The panel opinion (Pet. App. A63-A102) is reported at

[1] Throughout this brief, our references to the petition appendix will be to the appendix filed in *Cuyahoga County Court of Common Pleas* v. *Popovich*, No. 01-1503.

227 F.3d 627. The opinion of the district court (Pet. App. A105-A131) is unreported.

JURISDICTION

The court of appeals entered its judgment on January 10, 2002. The petition for a writ of certiorari in No. 01-1503 was filed on April 8, 2002. The petition for a writ of certiorari in No. 01-1517 was filed on April 10, 2002. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, is a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). The Disabilities Act targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165 (1994 & Supp. V 1999), addresses discrimination by governmental entities; and Title III, 42 U.S.C. 12181-12189 (1994 & Supp. V 1999), addresses discrimination in public accommodations operated by private entities. In passing the Disabilities Act, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. 12101(b)(4).

By its terms, the Disabilities Act's prohibitions on discrimination are enforceable against public entities through private suits. See, *e.g.*, 42 U.S.C. 12133; see also *Olmstead* v. *L.C.*, 527 U.S. 581, 590 (1999). In the Disabilities Act, Congress expressly abrogated the

States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202 (a "State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter").

This case involves a suit under Title II of the Disabilities Act, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is expressly defined to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. 12131(1)(A) and (B). The case also implicates the Disabilities Act's anti-retaliation provision, which prohibits discrimination against those who file complaints alleging violations of the Act or otherwise exercise the rights accorded by the law. 42 U.S.C. 12203.

Congress instructed the Attorney General to issue regulations implementing the provisions of Title II. See 42 U.S.C. 12134(a); see generally 28 C.F.R. Pt. 35. One such regulation provides that "[a] public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity." 28 C.F.R. 35.160(b)(1); see also 28 C.F.R. 35.104 (defining "auxiliary aids and services" to include "[q]ualified interpreters, notetakers, transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listen-

ing systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments"). The public entity need not "take any action [under the auxiliary aids regulation] that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. 35.164.

2. Following divorce proceedings, petitioner Joseph Popovich was awarded primary custody of his minor daughter. In August 1992, on an *ex parte* petition from Popovich's ex-wife, petitioner Domestic Relations Division of the Cuyahoga County Court of Common Pleas (Cuyahoga County Court) issued a temporary order removing Popovich's then eleven-year-old daughter from his home and enjoining Popovich from having any contact with her at all. Pet. App. A69, A109-110; 1 C.A. App. 450.

Popovich has a hearing impairment that makes it difficult for him to understand speech. In hearings during September and October 1992 to adjudicate the need for and continuation of the temporary *ex parte* order, the Cuyahoga County Court provided Popovich with a headset that amplified the speech of participants in the court proceedings. On October 23, 1992, Popovich informed the Cuyahoga County Court that the use of the headset had caused an ear infection and that it no longer provided effective amplification for his hearing impairment. The Cuyahoga County Court continued the proceedings until December 1992. On December 1, 1992, Popovich advised that an alternative method of communication would be necessary, in light

of his deteriorating hearing condition, and requested that the Cuyahoga County Court provide him with some type of instantaneous transcription process. The Cuyahoga County Court told Popovich that he must choose between proceeding with the custody hearing on the merits without an alternative form of hearing assistance, or continuing the *ex parte* order separating him from his daughter and scheduling a separate hearing to determine what accommodations needed to be made. Because Popovich was unable to hear, and thus to participate, in the custody proceedings, he elected the separate hearing. That hearing was scheduled for February 1993, but was never held. Pet. App. A109, A111-A113; 1 C.A. App. 299, 544.

On December 2, 1992, the United States Department of Justice notified Cuyahoga County Court that the Department had received a complaint from Popovich that the court was violating the Disabilities Act and that the Department was commencing an investigation. The Cuyahoga County Court then cancelled the custody hearing and refused to conduct any further proceedings pending the completion of the Justice Department's investigation, despite repeated requests by the Justice Department that proceedings not be delayed. In June 1993, over Popovich's objection and without a hearing, the Cuyahoga County Court extended indefinitely the *ex parte* order enjoining Popovich from having any contact with his daughter. Popovich appealed the order, but the state appellate courts dismissed his appeal, returning the case to the Cuyahoga County Court in February 1994. Pet. App. A113, A115, A128-A129; 1 C.A. App. 303; 3/31/98 Tr. 293, 302.

In October 1994, after a meeting with Popovich's attorney, the Cuyahoga County Court stated that it

would provide Popovich with an instantaneous transcription process during the custody hearing. The Cuyahoga County Court also modified its two-year-old *ex parte* order to permit Popovich to visit his daughter, with the permission and supervision of the guardian ad litem. No further custody proceedings were held for three years, however. In July 1995, the Cuyahoga County Court authorized Popovich's daughter to move out-of-state to live with her mother. Pet. App. A115-A117; 4/1/98 Tr. 338-339. When, in 1997, the Cuyahoga County Court finally resumed the custody hearing, Popovich regained full custody of his daughter. Pet. App. A117.

3. Popovich filed suit in March 1995 against the Cuyahoga County Court and the County of Cuyahoga in federal district court alleging violations of the non-discrimination and anti-retaliation provisions of the Disabilities Act.[2] The complaint sought an injunction ordering defendants both to provide an appropriate accommodation and to rule on Popovich's pending motion to terminate the *ex parte* injunction restricting his contact with his daughter. 1 C.A. App. 29. The complaint was amended six months later to add a claim for compensatory damages. *Id.* at 40-41.

On April 13, 1998, the jury returned a verdict in favor of Popovich. In special interrogatories, the jury found that the Cuyahoga County Court and Cuyahoga County had unlawfully discriminated and retaliated against Popovich. Pet. App. A135-A136; 4/6/98 Tr. 801-802. The jury awarded $400,000 in compensatory damages. Pet. App. A136. At no point before the jury's verdict did the

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[2] Popovich also sued a judge in his official capacity, but that defendant was dismissed from the case before trial. 4/2/98 Tr. 614.

Cuyahoga County Court invoke Eleventh Amendment immunity.

On April 23, 1998, the Cuyahoga County Court and Cuyahoga County filed a motion for a new trial, judgment as a matter of law, and remittitur. Pet. App. A105, A123, A135-A136. That motion did not assert Eleventh Amendment immunity. On July 28, 1998, while that motion was still pending, the district court issued an injunction ordering the Cuyahoga County Court and Cuyahoga County to provide Popovich with real-time captioning for any proceeding that required his active participation and prohibiting further acts of retaliation. *Id.* at A132-A134. Petitioner and Cuyahoga County filed a notice of appeal "from the Judgment Entry of July 28, 1998 awarding injunctive relief." 1 C.A. App. 46.

The district court subsequently issued an order granting judgment as a matter of law in favor of Cuyahoga County, but denying Cuyahoga County Court's requests for relief. On November 19, 1998, the court entered an amended damages judgment, solely against Cuyahoga County Court. Pet. App. A103. Cuyahoga County Court did not file a notice of appeal from either the original or the amended judgments awarding damages.

4. On appeal, Cuyahoga County Court did not raise a claim of Eleventh Amendment immunity in its opening brief. In its reply brief, the Cuyahoga County Court included a "cryptic," Pet. App. A71, and "abbreviated, afterthought reference to the Eleventh Amendment immunity," *id.* at A33. See also *id.* at A22 n.8.[3] The

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[3] In the midst of a discussion of *qualified* immunity, the Cuyahoga County Court referred to the Eighth Circuit's decision in *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (1999), cert. dismissed,

court of appeals then directed the parties to submit supplemental letter briefs addressing the Eleventh Amendment issue. *Id.* at A33. The court, however, denied without explanation the United States' motion to intervene, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of the law. Pet. App. A22 n.8.

The court of appeals reversed and remanded. Pet. App. A63-A102. It concluded that, despite Cuyahoga County Court's failure to invoke Eleventh Amendment immunity in a timely manner, the court could, in its discretion, address the constitutionality of an Act of Congress. The court then concluded that Title II of the Disabilities Act was not a "congruent and proportional" means of enforcing the Equal Protection Clause because it prohibits "a broad swath" of constitutional conduct, *id.* at A88, and because Congress's findings of discrimination against persons with disabilities were not supported by "evidence in the legislative history," *id.* at A96.

5. The en banc court of appeals vacated and remanded. Pet. App. A1-A60.[4] The court acknowledged that this Court, in *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), had specifically reserved the question of whether the abrogation of Eleventh Amendment immunity for Title II was

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529 U.S. 1001 (2000), and invited the court of appeals to "declare Title II of the [Disabilities Act] unconstitutional as applied to the states." C.A. Reply Br. 34. Immediately thereafter, Cuyahoga County Court advised the court of appeals that resolution of that "federal constitutional issue * * * can be avoided" "in light of the record in this case." *Ibid.*

[4] The en banc court of appeals permitted the United States to intervene, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of Congress's abrogation of the States' Eleventh Amendment immunity. Pet. App. A23 n.8.

valid. Pet. App. A10-A11. The court concluded that the reasoning of *Garrett* applied equally to the question whether Title II's abrogation could be sustained as appropriate legislation to enforce the Equal Protection Clause. *Id.* at A6-A9.

The court held, however, that "as applied" to Popovich's claim that he had been denied an accommodation needed to participate meaningfully in hearings involving the custody of his daughter, Congress's abrogation could be sustained as appropriate legislation to enforce the Due Process Clause. Pet. App. A11-A17. Because the jury instruction had been "based on equal protection principles," the court vacated the jury award and remanded for a trial on a theory of "unreasonable exclusion from judicial proceedings based on disability in a due process-type claim." *Id.* at A19.

Judge Moore, writing for herself and four other judges, concurred in part and in the judgment. Pet. App. A23-A31. While agreeing with the court's Due Process Clause holding, *id.* at A23, she also would have sustained Title II's abrogation as appropriate legislation to enforce the Equal Protection Clause. In her view, Congress's "express findings" relating to "a pattern of unconstitutional discrimination by the states" were supported by an "extensive study and record" that "the states have discriminated against the disabled in many aspects of governmental operations and that they may continue to do so." *Id.* at A26-A27, A29, A30. This "extensive record of constitutional violations in the states' provision of public services to persons with disabilities," *id.* at A29, demonstrated

that Title II's obligations were a "congruent and proportional" remedy, *id.* at A29-A31.[5]

Judge Ryan, writing for himself and five other judges, concurred in part and dissented in part, on the ground that Title II is not appropriate legislation to enforce either the Equal Protection or Due Process Clause. Pet. App. A31-A53.

ARGUMENT

Petitioner Cuyahoga County Court and petitioner Popovich are correct (No. 01-1503 Pet. 7-20; No. 01-1517 Pet. 15-19) that the question of Congress's power to abrogate the States' Eleventh Amendment immunity for claims under Title II of the Disabilities Act is an important question that may merit review by this Court at the appropriate time and in the appropriate case.[6] This, however, is not that case. To the contrary,

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[5] Judge Gilman filed a partial dissent in which he "fully concur[red] in the judgment of the court that upholds the constitutionality of Title II of the Americans with Disabilities Act," Pet. App. A54, but in which he also argued that Judge Merritt's participation in the en banc proceedings violated 28 U.S.C. 46(c). Pet. App. A53-A60.

[6] Since this Court's decision in *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), which invalidated the abrogation of Eleventh Amendment immunity for Title I of the Disabilities Act, the courts of appeals addressing the constitutionality of Congress's abrogation of Eleventh Amendment immunity for Title II of the Disabilities Act have reached differing results with varying degrees of analysis. The Fifth, Eighth, and Tenth Circuits have held that the abrogation for Title II suits cannot be sustained as valid Section 5 legislation. See *Reickenbacker* v. *Foster*, 274 F.3d 974 (5th Cir. 2001); *Randolph* v. *Rodgers*, 253 F.3d 342, 345 n.4 (8th Cir. 2001); *Thompson* v. *Colorado*, 278 F.3d 1020 (10th Cir. 2001), cert. denied, 122 S. Ct. 1960 (2002). The Ninth Circuit has upheld the abrogation. See *Hason* v. *Medical Bd.*, 279 F.3d 1167 (2002). The Second Circuit has held that the

there are significant jurisdictional, statutory, and prudential barriers to granting plenary review here.

1. This case appears to be moot and, indeed, likely was moot at the time both the original court of appeals panel and the en banc court issued their decisions.

a. *The Claim For Money Damages*: The Eleventh Amendment question presented by petitioner Cuyahoga County Court to this Court is expressly confined to challenging the constitutionality of the Disabilities Act's abrogation of immunity for awards of money damages. The question presented does not assert a general immunity to suit or an immunity to injunctive relief in particular. See No. 01-1503 Pet. i (questioning Congress's authority to abrogate "Eleventh Amendment immunity from private damage claims").[7] Cuyahoga County Court, however, never filed a notice of appeal from the district court's damages judgment when it took its appeal to the Sixth Circuit. The propriety of the abrogation of immunity for money damages thus was never properly presented to the court of appeals and, consequently, has not been preserved for this Court's review.

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abrogation can be sustained in Title II cases if the government's action was undertaken with "discriminatory animus or ill will towards the disabled." *Garcia* v. *SUNY Health Sciences Ctr.*, 280 F.3d 98, 111 (2001).

[7] See also No. 01-1503 Pet. 7 ("private damage suits"), 8 ("private damage suits"), 9 ("private claims for damages"), 14 ("damage suits"), 16 ("money damages"), 20 ("private money damage claims"); No. 01-1517 Pet. 4 (in describing remedy awarded, only mentioning damages), 8 (same), 15 (noting that courts are divided on whether "states may be sued for money damages"). Contrast No. 01-1503 Pet. 19 (quoting question presented in *Alsbrook* v. *Arkansas*, No. 99-423, which asked whether Congress had power to abrogate "immunity from suit by individuals").

The only notice of appeal ever filed by Cuyahoga County Court exclusively identified the "Judgment Entry of July 28, 1998 awarding injunctive relief" as the order that was being appealed. 1 C.A. App. 46. Indeed, the notice of appeal includes a footnote reference explaining that the "Judgment Entry of April 13, 1998" —the jury's award of damages—"remains pending as the Court has not yet ruled on Defendants' Motion For A New Trial and Judgment As A Matter Of Law." *Id.* at 46 n.1. Cuyahoga County Court never subsequently filed a notice of appeal from either the original April 13, 1998, judgment awarding damages, or from the district court's later denial of its motion for a new trial or judgment as a matter of law, as embodied in the amended order awarding damages of November 19, 1998.[8]

Federal Rule of Appellate Procedure 3(c)(1)(B) provides that a notice of appeal must "designate the judg-

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[8] Cuyahoga County Court's first mention of an appeal of the damages judgment appears in its Civil Appeal Conference Statement, see 6th Cir. R. 33(b)(1), which was signed and dated on December 22, 1998—32 days after entry of the amended judgment. The Civil Appeal Conference Statement is not recorded on the Sixth Circuit's docket sheet. We have been advised by the Office of the Clerk for the Sixth Circuit that Cuyahoga County Court faxed that Statement to the court of appeals on December 22, 1998. Thus, even if that Statement were viewed as an attempt to amend the notice of appeal, it arrived too late to do so. See Fed. R. App. P. 4(a)(4)(B)(ii) and (d). In any event, an unpublished decision of the Sixth Circuit indicates that the court will not treat the Civil Appeal Conference Statement as a notice of appeal. *Harvey Invs., Inc.* v. *Toyota Motor Sales, U.S.A., Inc.*, No. 97-1925, 1998 WL 767080, at *6 n.4 (6th Cir. Oct. 23, 1998) (166 F.3d 1213 (Table)). See 6th Cir. R. 28(g) (an unpublished opinion may be cited if the decision has "precedential value in relation to a material issue in a case, and * * * there is no published opinion that would serve as well").

ment, order, or part thereof being appealed." Compliance with Rule 3(c) is a "jurisdictional prerequisite" to an appeal. *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988); see also *Becker* v. *Montgomery*, 532 U.S. 757, 765-766 (2001) (Rule 3(c)(1)'s "specifications" of what a notice of appeal must contain are "jurisdictional provisions").

Furthermore, when a notice of appeal designates a particular interlocutory judgment or order, a court of appeals lacks jurisdiction over any other judgment or order. See, *e.g.*, *Parkhill* v. *Minnesota Mut. Life Ins. Co.*, 286 F.3d 1051, 1058 (8th Cir. 2002); *United States* v. *Glover*, 242 F.3d 333, 334-337 (6th Cir. 2001); *Lockett* v. *Anderson*, 230 F.3d 695, 699-701 (5th Cir. 2000); *Laurino* v. *Tate*, 220 F.3d 1213, 1219 (10th Cir. 2000); *Johnson* v. *Smithsonian Inst.*, 189 F.3d 180, 185 n.2 (2d Cir. 1999); *Bogle* v. *Orange County Bd. of County Comm'rs*, 162 F.3d 653, 661 (11th Cir. 1998); *Garcia* v. *City of Chicago*, 24 F.3d 966, 969 n.4 (7th Cir. 1994), cert. denied, 514 U.S. 1003 (1995); *Lockary* v. *Kayfetz*, 917 F.2d 1150, 1157 (9th Cir. 1990). Thus, Cuyahoga County Court's notice of appeal from the award granting injunctive relief did not give the court of appeals jurisdiction over the separately entered damages judgment.

While Popovich did file a timely notice of appeal from the amended damages order, his appeal was limited to the dismissal of the County from the case and the denial of pre-judgment interest. He subsequently withdrew the claim against the County before decision, and he abandoned the pre-judgment interest claim by failing to brief it. Pet. App. A70. In any event, it is a "firmly entrenched rule" that, "[a]bsent a cross-appeal" from the damages judgment, Cuyahoga County Court could not "attack the [money judgment] decree with a view either

to enlarging [its] own rights thereunder or of lessening the rights of [its] adversary." *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 479-480 (1999). Popovich's short-lived appeal thus did not afford the court of appeals jurisdiction over the damages judgment either.

In short, because Cuyahoga County Court failed to appeal or cross-appeal from the judgment awarding money damages, the court of appeals lacked jurisdiction over that judgment, and the constitutionality of Congress's abrogation of Eleventh Amendment immunity for damages is not properly preserved for this Court's review.

b. *The Claim For Injunctive Relief*: Cuyahoga County Court's notice of appeal did give the court of appeals jurisdiction to address its challenge to the judgment ordering *injunctive* relief. However, the common pleas proceedings to which Popovich was a party were terminated on April 24, 1998, with Popovich retaining custody of his daughter and all outstanding injunctions being vacated. That order was affirmed by the state court of appeals in November 1999. See *Whinsenant* v. *Popovich*, No. 74559, 1999 WL 1024205 (Ohio Ct. App. Nov. 10, 1999). Therefore, the claim for injunctive relief became moot while the appeal was pending in the court of appeals. See *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 68, 72 (1997). Furthermore, Popovich's daughter turned 18 on December 19, 1998 (1 C.A. App. 262), divesting the court of common pleas of jurisdiction over any current or future custodial dispute involving her. See *Maphet* v. *Heiselman*, 469 N.E.2d 92, 93-94 (Ohio Ct. App. 1984). Because Popovich's daughter—the youngest of his children, see 1 C.A. App. 450—has now reached the age of majority, the conflict between these parties is incapable of repetition. It does not appear that either of the parties

to this litigation brought those intervening developments to the attention of either the original panel or the en banc court.

The mootness of the case would appear to preclude this Court from addressing the Eleventh Amendment question. See *Calderon* v. *Ashmus*, 523 U.S. 740, 745 & n.2 (1998) (Court "must first address" whether there is a "case or controversy" before reaching Eleventh Amendment issue, because the Eleventh Amendment "is not coextensive with the limitations on judicial power in Article III."); see also *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 771, 778-779 (2000) (standing and cause of action questions resolved before Eleventh Amendment); *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 192 (2000) (courts have "no[] license * * * to retain jurisdiction over cases in which one or both of the parties plainly lack a continuing interest"); *Riley* v. *St. Luke's Episcopal Hosp.*, 196 F.3d 514, 523 (5th Cir. 1999) (standing issue poses "a more 'basic' jurisdictional requirement" and thus must be addressed in advance of an Eleventh Amendment claim). While, in other circumstances, this Court has held that courts may "choose among threshold grounds for denying audience to a case on the merits," *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 585 (1999), well-established principles of constitutional avoidance counsel against unnecessarily addressing the constitutionality of Acts of Congress in cases where alternative means of disposing of the case are available at the threshold. See generally *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Moreover, because the mootness of the case destroys any jurisdictional foundation for the court of appeals' partial invalidation of an Act of Congress as

unconstitutional—which is "the gravest and most delicate duty that [a] Court is called upon to perform," *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981)—the court of appeals' decision should be vacated.

2. This case also contains a potential statutory bar to federal jurisdiction that is distinct from the Eleventh Amendment question presented and that could prevent resolution of that question in this case. Under the *Rooker-Feldman* doctrine (see *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983); *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923)), federal district courts lack subject-matter jurisdiction over any action that "in essence, would be an attempt to obtain direct review of the [state court's judicial] decision in the lower federal courts," *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 622-623 (1989). In addition to its statutory basis (28 U.S.C. 1257), the *Rooker-Feldman* doctrine is rooted in notions of comity and federalism that presume that state courts are willing and able to apply federal law and respect federal rights as well as their federal court counterparts. See *Feldman*, 460 U.S. at 484 n.16; see also *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 610-611 (1975).

Cuyahoga County Court raised *Rooker-Feldman* before the district court, which rejected the argument. Pet. App. A125-A128. Cuyahoga County Court renewed its argument in its initial brief to the court of appeals, C.A. Br. 19-21, but neither the panel nor the en banc court addressed it. Neither Cuyahoga County Court nor Popovich mentions the issue in its petition. The *Rooker-Feldman* doctrine, however, is a limitation on the courts' subject-matter jurisdiction that cannot be waived and must be addressed by this Court even if it is not raised by the other parties. See *Feldman*, 460 U.S. at 486-487; *Ace Constr.* v. *City of St. Louis*, 263

F.3d 831, 833 (8th Cir. 2001); *4901 Corp.* v. *Town of Cicero*, 220 F.3d 522, 527 (7th Cir. 2000); *Weekly* v. *Morrow*, 204 F.3d 613, 615 (5th Cir. 2000); *Hachamovitch* v. *DeBuono*, 159 F.3d 687, 696 n.2 (2d Cir. 1998).

Popovich's claims arise out of the actions of a common pleas court presiding over a judicial proceeding in which he was a party. Popovich's retaliation claim, which he describes (No. 01-1517 Pet. 3) as based on a "*de facto* stay of proceedings" in response to his filing of a complaint with the Justice Department, appears to implicate the *Rooker-Feldman* doctrine. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis* v. *North American Co.*, 299 U.S. 248, 254 (1936); see also *Hagerty* v. *Succession of Clement*, 749 F.2d 217, 219-220 (5th Cir. 1984) (*Rooker-Feldman* bars federal court from hearing challenge to state court's decision to deny continuance), cert. denied, 474 U.S. 968 (1985).[9]

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[9] The courts of appeals are in accord that district courts are barred by *Rooker-Feldman* from hearing challenges that various interlocutory procedural orders by state courts violated a party's federal constitutional or statutory rights. See, *e.g.*, *Brown & Root, Inc.* v. *Breckenridge*, 211 F.3d 194 (4th Cir. 2000) (state court's refusal to stay proceeding and order arbitration); *Gentner* v. *Shulman*, 55 F.3d 87, 89 (2d Cir. 1995) (state court's disqualification of counsel); *Wright* v. *Tackett*, 39 F.3d 155, 157-158 (7th Cir. 1994) (state court's denial of request to intervene in foreclosure actions), cert. denied, 513 U.S. 1150 (1995); *Keene Corp.* v. *Cass*, 908 F.2d 293, 297 (8th Cir. 1990) (state court's discovery order); *Howell* v. *Supreme Court of Tex.*, 885 F.2d 308, 311 (5th Cir. 1989) (state judge's refusal to recuse), cert. denied, 496 U.S. 936 (1990).

Whether Popovich's discrimination claim is likewise barred is a more difficult question. In order for *Rooker-Feldman* to apply, the challenged action must be "judicial in nature," *Feldman*, 460 U.S. at 476. An "administrative" decision does not trigger the doctrine. *Id.* at 479. On the one hand, the decision on how to accommodate Popovich's disability was made by a judge and ultimately embodied in a court order. Pet. App. A112. On the other hand, the decision on how to comply with the Disabilities Act's requirement to "furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in" court proceedings, 28 C.F.R. 35.160(b)(1), was not inherently judicial. Cf. *Forrester* v. *White*, 484 U.S. 219, 229 (1988) (judge not entitled to judicial immunity when acting in administrative capacity, *e.g.*, "supervising court employees and overseeing the efficient operation of a court"); 4/1/98 Tr. 314, 316, 327 (testimony of court administrator that his general duties included addressing complaints under the Disabilities Act under the supervision of the administrative judge); 4/2/98 Tr. 421-422 (testimony of judge that he consulted with court administrator and administrative judge before deciding how to accommodate Popovich). In fact, the same obligation applies to all public entities. Cf. *Forrester*, 484 U.S. at 228 (noting that judicial immunity is less appropriate when the same tasks are performed by other branches of government).

There is little relevant authority addressing the distinction between judicial and administrative acts for purposes of triggering the *Rooker-Feldman* doctrine.[10]

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[10] Outside the context of regulating membership in the bar (the situation at issue in *Rooker* and *Feldman*), we are aware of only

Because of the difficulty and relative novelty of that question, the United States takes no position on the ultimate question of whether *Rooker-Feldman* bars Popovich's claims. But the existence of that potential non-constitutional and jurisdictional obstacle to this Court's review of the questions presented counsels strongly against granting these petitions. Indeed, this Court recently denied certiorari in another case that presented a similar challenge to Title II's abrogation of Eleventh Amendment immunity, but that also suffered from jurisdictional and prudential barriers to review. See *Thompson* v. *Colorado*, 122 S. Ct. 1960 (2002).

3. A logical antecedent to adjudicating the constitutional questions presented for review is determining whether the Cuyahoga County Court is an "arm of the state" entitled to Eleventh Amendment immunity. The Sixth Circuit concluded that the Cuyahoga County Court is an arm of the state, see Pet App. A75 (citing *Mumford* v. *Basinski*, 105 F.3d 264, cert. denied, 522 U.S. 914 (1997)). This Court's precedents strongly suggest otherwise.

Eleventh Amendment immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an "arm of the State." See *Alden* v. *Maine*, 527 U.S. 706, 756 (1999); *Lincoln County* v. *Luning*, 133 U.S. 529 (1890). Whether Cuyahoga County Court is an arm of the state is a question of federal law, that this Court reviews de

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two appellate decisions (coming out of the same circuit) that have analyzed the line between administrative and judicial actions, for purposes of *Rooker-Feldman*. See *Guarino* v. *Larsen*, 11 F.3d 1151, 1157-1160 (3d Cir. 1993) (civil rights challenge to revocation of judge's senior status); *Blake* v. *Papadakos*, 953 F.2d 68, 72-73 (3d Cir. 1992) (suit to enjoin state court from exercising administrative powers of a judge's office).

novo. See *Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. 425, 429 n.5 (1997); see also *Lapides* v. *Board of Regents of the Univ. Sys. of Ga.*, 122 S. Ct. 1640, 1645 (2002). Relevant factors to consider include the court's description under state law, the provenance of the court's officials, the functions of the court, the extent of control of the court's actions by the State, and the State's financial responsibility for the court or for any judgment entered. See *Doe*, 519 U.S. at 430; *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44-45 (1994) (discussing *Lake Country Estates, Inc.* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401-402 (1979)).

Those factors strongly indicate that the Cuyahoga County Court is not an arm of the state. First, under Ohio law, a court of common pleas is defined as a "political subdivision" for purposes of tort liability. See *Dalton* v. *Bureau of Criminal Identification & Investigation*, 530 N.E.2d 35 (Ohio Ct. App. 1987) (interpreting Ohio Rev. Code Ann. § 2743.01 (Anderson 2000)); *Tymcio* v. *State*, 369 N.E.2d 1063 (Ohio Ct. App. 1977) (same); see also *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280 (1977) (relying on the same Ohio statute in concluding that Ohio school districts are not arms of the state).

Second, the provenance of the courts' officers also evidences a local, rather than state-based, entity. The judges of the court of common pleas are elected by county electors. See Ohio Rev. Code Ann. § 2301.01 (Anderson 2001). They must also be residents of the county in which they are elected. See *ibid.*

Third, and most significantly, the money judgment entered in this case would not be enforceable against the State treasury. That factor "is of considerable importance" to the arm-of-the-state inquiry. *Doe*, 519 U.S. at 430; see also *Hess*, 513 U.S. at 47, 51. Under

Ohio law, the State is under no obligation to pay the judgment entered against the Cuyahoga County Court. When judgments are awarded against a "political subdivision"—a state law term interpreted to include courts of common pleas—

> [s]uch judgments shall be paid from funds of the political subdivision that have been appropriated for that purpose, but, if sufficient funds are not currently appropriated for the payment of judgments, the fiscal officer of a political subdivision shall certify the amount of any unpaid judgments to the taxing authority of the political subdivision for inclusion in the next succeeding budget.

Ohio Rev. Code Ann. § 2744.06(A) (Anderson Supp. 2001). The court of common pleas does not have the authority to tax. It is the *county* that is authorized to levy a special property tax to pay for the court's expenses. *Id.* § 5707.02 (Anderson 2002). While the common pleas court does have the authority to assess various fees against litigants, all fees received by the court must be given to the county. *Id.* § 325.27 (Anderson 1998). And while the State and county share the costs of judges' salaries, *id.* §§ 141.04, 141.05, 141.07 (Anderson 2001), it is the county that is obliged to provide a courthouse and pay all expenses "reasonably necessary for its operation," including all the costs of court personnel and services. *Id.* § 307.01(B) (Anderson Supp. 2001); Ohio Op. Att'y Gen. No. 89-029, 1989 WL 455369 (May 15, 1989). Thus, it appears that it would be the county—not the State—that ultimately would be

responsible for providing the funds to pay the judgment in this case.[11]

The fourth factor—the court's function—does nothing to undercut its local character. Localities, as well as States, have traditionally operated courts. See, *e.g.*, *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972) (Mayor's Court); *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960) (Police Court).

Only the question of control weighs in favor of "arm of the state" status. State law authorizes both the state legislature and the state supreme court to remove judges from their positions. See Ohio Rev. Code Ann. §§ 2701.11-2701.12 (Anderson 2000). And the court's judicial decisions may be reviewed by the state supreme court. But those considerations alone are not dispositive. Cf. *Hess*, 513 U.S. at 44, 47-48 (fact that States appointed and removed commissioners and that governors could veto entity's actions were not sufficient to render the entity an arm of the state).

The Sixth Circuit's decision here, applying its earlier decision in *Mumford*, did not address this Court's factors. Instead, the court focused on the fact that the Cuyahoga County Court was created by state law. See 105 F.3d at 268-269. But the same is true of counties,

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[11] This understanding is confirmed by the county's duties to defend and to indemnify court personnel. The county must defend suits brought against the common pleas judges and other court personnel. Ohio Rev. Code Ann. § 309.09 (Anderson Supp. 2001); Ohio Op. Att'y Gen. No. 85-014, 1985 WL 204483 (Apr. 9, 1985). And the county must indemnify the judges and other personnel for "any damages" awarded by a "state or federal court" if the person was acting "in good faith and within the scope of his employment or official responsibilities." Ohio Rev. Code Ann. § 2744.07(A)(2) (Anderson 2000); see Ohio Op. Att'y Gen. No. 88-055, 1988 WL 428848 (Aug. 25, 1988).

cities, and school districts—yet they indisputably do not enjoy Eleventh Amendment immunity, even though they exercise a "slice of state power." *Lake County Estates*, 440 U.S. at 401. Indeed, the entire analysis in *Mumford* appears to have been skewed by the court's belief that a court of common pleas had to be either an arm of the state or "an appendage" or "extension" of the county government. 105 F.3d at 268. It did not address the possibility that a court of common pleas, like a school or water district, could be an entity apart from the county and yet still not be entitled to the State's immunity.

Because it is highly dubious that petitioner is an "arm of the state" entitled to invoke the States' Eleventh Amendment immunity, this case is ill-suited for consideration of the important question of the constitutionality of the Disabilities Act's abrogation of that immunity. At a minimum, the prospect of this Court's declaring unconstitutional a provision of federal law duly enacted by the Congress and signed by the President based on a constitutional provision's hypothesized application—especially when that application is subject to substantial doubt—raises profound separation-of-powers concerns that lie at the core of the *Ashwander* principle of constitutional avoidance, see *Ashwander*, *supra*, and that likewise should weigh heavily in this Court's exercise of its certiorari jurisdiction. Cf. *Garrett*, 531 U.S. at 360 n.1 (dismissing as improvidently granted the question whether Title II validly abrogated Eleventh Amendment immunity, when there was an open question whether Title II applied to the conduct at issue).

4. Petitioner Popovich also seeks this Court's review (No. 01-1517 Pet. 6-15) of the question whether the Cuyahoga County Court waived its Eleventh Amend-

ment immunity by failing to assert it at any stage of this litigation, prior to its "cryptic" and "abbreviated, afterthought reference" to it, Pet. App. A71, A33, near the end of its court of appeals reply brief. We agree that there is a substantial argument that the Cuyahoga County Court did waive its Eleventh Amendment immunity (if any). Its belated and opaque assertion of the claim threatens the type of "inconsistency, anomal[ies], and unfairness" and "unfair tactical advantage[s]" that this Court recently held the Eleventh Amendment does not condone. *Lapides*, 122 S. Ct. at 1644-1645; see also *Wisconsin Dep't of Corr.* v. *Schacht*, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring) ("In permitting the belated assertion of the Eleventh Amendment bar, we allow States to proceed to judgment without facing any real risk of adverse consequences. Should the State prevail, the plaintiff would be bound by principles of res judicata. If the State were to lose, however, it could void the entire judgment simply by asserting its immunity on appeal."). At a minimum, the substantiality of the waiver question presents yet another reason why this case is an inappropriate vehicle for consideration of the important constitutional question presented. In light of the other substantial jurisdictional and prudential problems plaguing this case and the uncertainty this Court's very recent decision in *Lapides* casts over the circuit conflict Popovich identifies (No. 01-1517 Pet. 11-14), a denial of certiorari on the waiver question would not be inappropriate.[12]

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[12] As Popovich acknowledges (No. 01-1517 Pet. 6 n.1), the court of appeals' opinion reflects a level of ambivalence about waiver that counsels against plenary review of the question.

The United States, however, does not oppose Popovich's suggestion (No. 01-1517 Pet. 14) that the court of appeals' decision be vacated and the case remanded for reconsideration in light of *Lapides*. This Court recently undertook a similar disposition in a case presenting an Eleventh Amendment challenge to the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.* See *Montgomery* v. *Maryland*, 122 S. Ct. 1958 (2002). Such a remand would also be appropriate to afford the parties the opportunity to call the court of appeals' attention to the mootness and other jurisdictional problems identified above. Indeed, vacatur is particularly appropriate because this case involves the partial invalidation of an Act of Congress by a court that lacked jurisdiction to assume that grave task.

CONCLUSION

The petitions for a writ of certiorari should be granted, the judgment below vacated, and the case remanded for further consideration in light of the mootness and jurisdictional problems discussed in this brief, or in light of *Lapides* v. *Board of Regents of the University System of Georgia*, 122 S. Ct. 1640 (2002). In the alternative, the petitions for a writ of certiorari should be denied.

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Nº. 01-1503

In The Supreme Court of the United States

COMMON PLEAS COURT OF CUYAHOGA COUNTY, OHIO DIVISION OF DOMESTIC RELATIONS,
Petitioner,

v.

JOSEPH M. POPOVICH and, UNITED STATES OF AMERICA,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

CUYAHOGA COUNTY COURT OF COMMON PLEAS, DOMESTIC RELATIONS DIVISION'S REPLY TO BRIEF OF THE UNITED STATES

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THE ISSUE OF THE STATE COURT'S ENTITLEMENT TO 11TH AMENDMENT IMMUNITY WAS PROPERLY RAISED IN THE SIXTH CIRCUIT

The suggestion by the United States that the money judgment giving rise to the Eleventh Amendment Immunity was not covered in the Notices of Appeal is not well taken.

The Department of Justice argues for the first time that the Sixth Circuit Court of Appeals did not have jurisdiction to hear this case. It claims that this is due to the fact that the State Court did not include all of the issues to be addressed in its "Notice of Appeal." This assertion is both inadequate and quite belated.

The DOJ suggests that its jurisdictional argument is so strong that it would have completely barred the appellate court's ability to hear the appeal. However, Popovich, the DOJ, and the *en banc* panel had the opportunity to raise any unresolved jurisdictional issues. On December 22, 1998, the parties agreed that all matters were properly before the Sixth Circuit.[1] Conveniently, the DOJ omits the fact that the Attorney General was served with the briefs clearly identifying the constitutional issue in September of 1999 and

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[1] Popovich received the Statement of Issues dated December 22, 1998 prior to the attorneys' conference, asking "are there any jurisdictional issues." The State Court would have filed a timely second protective notice on December 22, 1998 within the fourteen (14) days after Popovich's Notice of Appeal had any jurisdictional questions been raised.

again when letter briefs were filed in June of 2000. The history makes it clear that exhaustive efforts have been expended by all parties on the relevant issues in this case: to suggest that a fundamental jurisdictional issue went unnoticed by everyone strains credibility.

It only makes sense to raise a jurisdictional argument at the time the case is actually in the questioned jurisdiction. Waiting until a case reaches the highest court in the land to assert that the lower court lacked jurisdiction simply evidences the fact that this argument lacks merit and is interjected merely to detract from the important issues presented. Similarly, the "other substantial jurisdictional and prudential problems" raised may fairly be characterized as an exhaustive search of the record in this case as a way of saying this is not the right case.

While the DOJ offers case law to support its argument, the authorities cited are unconvincing. In fact, the leading cases support the exercise of jurisdiction. *See, e.g.*, *Becker v. Montgomery*, 532 U.S. 757, 767 (2001)("Other opinions of this Court are in full harmony with the view that imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court."); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988)("...a court may construe the Rules liberally in determining whether they have been complied with."); *Parkhill v. Minn. Mut. Life Ins. Co.*, 286 F.3d 1051, 1058 (8th Cir. 2002)("When determining

whether an appeal from a particular district court action is properly taken, we construe the notice of appeal liberally and permit review where the intent of the appeal is obvious and the adverse party incurs no prejudice." (citing *Moore v. Robertson Fire Prot. Dist.*, 249 F.3d 786, 788 (8th Cir. 2001)); *Laurino v. Tate*, 220 F.3d 1213, 1218 (10th Cir. 2000)(court should exercise jurisdiction where intent to appeal particular issue is clear).

Had the Sixth Circuit addressed this issue directly, the result would be the same. In *Harris v. United States*, 170 F.3d 607 (6th Cir. 1999), the Sixth Circuit allowed the appeal of a judgment that had not been included on the Notice of Appeal. The Court found there was no evidence of any prejudice to Appellee, especially since Appellee "did not even raise a jurisdictional objection to the petitioner's appeal until the court *sua sponte* ordered the matter briefed." *Harris*, 170 F.3d at 607.

The issue of the subject matter of an appeal is addressed in Rule 3(c)(1)(B) of the Federal Rules of Appellate Procedure. The rule states, "The notice of appeal must designate the judgment, order or part thereof being appealed . . . ." The DOJ asserts that compliance with Rule 3(c) is a "jurisdictional prerequisite" to an appeal. In support of this proposition, the DOJ relies on *Torres v. Oakland*, 487 U.S. 312, 318 (1988). However, a closer examination of *Torres*

reveals that the case, in fact, centers around Rule 3(c)(1)(A)[2] rather than Rule 3(c)(1)(B).

While *Torres* contains broad language regarding a more rigorous reading of Rule 3(c) as a whole, the DOJ ignores the fact that *Torres* was superseded by the 1993 Amendments to the Federal Rules of Appellate Procedure. Specifically, the Advisory Committee Notes on subdivision (c) of Rule 3 negate the strict reading of the rule mandated by *Torres* and instead recognize that appeals should not be dismissed on mere technicalities.

The DOJ's assertion that compliance with Rule 3(c) is a "jurisdictional prerequisite" to an appeal is not entirely correct. This Court has shied away from a rigid interpretation of the rule.

In *Foman v. Davis*, 371 U.S. 178 (1962), this Court held that there was appellate jurisdiction over a judgment that had not been specified in the Notice to Appeal. The Court found that there was no prejudice to the Appellee, in that both parties had briefed and argued the merits of the judgment on appeal. *Foman*, 371 U.S. at 181.

The Ninth Circuit Court of Appeals took this analysis a step further in *Meehan v. Cty. of Los Angeles*, 856 F.2d 102

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[2] Rule 3(c)(1)(A) pertains solely to the requirement that a notice of appeal's caption must name the specific parties taking the appeal; the Rule construed in *Torres* is thus not relevant to this case.

(9th Cir. 1988). "A two-part test is used to determine whether "intent" and "prejudice" are present: 'first, whether the affected party had notice of the issue on appeal; and, second, whether the affected party had an opportunity to fully brief the issue.'" *Meehan*, 856 F.2d at 105 (quoting *Lynn v. Sheet Metal Workers' Intern. Assoc.*, 804 F.2d 1471, 1481 (9th Cir. 1986)). The Court determined that the failure to include an issue in the notice of appeal did not prejudice the appellee. Because he had briefed the omitted issue, the Court determined that the appellee had notice of the issue. *Id.* at 105-106.

The Third Circuit Court of Appeals came to the same conclusion in *Williams v. Guzzardi*, 875 F.2d 46, 49 (3rd Cir. 1989) (asserting appellate jurisdiction over orders not specified in the notice of appeal if there is a connection between the specified and unspecified order and there has been a full opportunity to brief the issues.) *Williams* also discusses *Elfman Motors, Inc. v. Chrysler Corp.*, 567 F.2d 1252 (3d Cir. 1977). Essentially coming to the same conclusion, *Elfman* held that a notice may be construed as identifying an unspecified order to be appealed if the intent to appeal the order was evident from the notice of appeal and the subsequent proceedings on appeal. *Elfman*, 567 F.2d at 1254.

THE CUYAHOGA COUNTY COURT OF COMMON PLEAS, DOMESTIC RELATIONS DIVISION IS AN ARM OF THE STATE OF OHIO AND AS SUCH ENJOYS 11TH AMENDMENT IMMUNITY

The United States questions whether the Cuyahoga County Court of Common Pleas, Domestic Relations Division is an "arm of the state" entitled to Eleventh Amendment immunity. This issue is a well-settled, fact-specific matter of state law.[3] Much like the federal judiciary, Ohio's state court system is created by constitution. The Ohio Constitution, Article IV, § 1 provides:

> The judicial power of the state is vested in a supreme court, courts of appeals, **courts of common pleas and divisions thereof**, and such other courts inferior to the supreme court as may from time to time be established by law.

Ohio Constitution, Art. IV, § 1 (emphasis added). Under this design, the Ohio courts of common pleas, including the

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[3] The question of whether the state court is an arm of the state does not prevent a grant of certiorari. See *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143 (1993) citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949) (state entities that claim to be "arms of the State" may take advantage of the collateral order doctrine permitting a "small class" of judgments that although not complete and final will be immediately appealable.)

Cuyahoga County Court of Common Pleas, Domestic Relations Division, are constitutional courts and not subject to elimination without a constitutional amendment.

Contrary to suggestion of the United States, Petitioner is a constitutionally mandated arm or branch of the government of the State of Ohio. Ohio Revised Code §§ 2743.01(A) and (B) (1993) and 2301.03(L) (1994); *Mumford v. Basinski*, 105 F.3d 264 (6th Cir. 1997), *cert. denied*, 522 U.S. 914 (1997). No precedent from this Court suggests otherwise.

Eleventh Amendment immunity extends to state entities that are "arms of the state." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70 (1989); *Harman v. Ohio Dept. of Corr.* (1991), 74 Ohio App. 3d 703, 705, 600 N.E.2d 314. A state entity is an "arm of the state," if it would meet the definition of an "arm of the state" under an Eleventh Amendment immunity analysis. *Will*, 491 U.S. at 70; *Harman*, 74 Ohio App. 3d at 705. Therefore, if the Court of Common Pleas is an "arm of the state," it is immune from money damage suits by private parties under Title II of the Americans with Disabilities Act, Title 42 U.S.C. § 12101 et seq. ["ADA"].

In determining whether a state entity is an arm of the state, whether a judgment obtained against the entity will be paid out of the state treasury is the most critical issue. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47-48 (1994); *Estate of Ritter v. University of Michigan*, 851 F.2d 846, 850 (6th Cir.1988); *Hall v. Medical College of Ohio at Toledo*, 742

F.2d 299, 302 (6th Cir. 1984); *Blake v. Kline*, 612 F.2d 718, 723 (3d Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). Because there is no evidence in the record addressing these factors, the United States' affirmative response is merely guess work with no basis.

The Sixth Circuit's holding in *Mumford* speaks directly to this issue. In *Mumford,* the Sixth Circuit analyzed the applicable Ohio statutory provisions and the record, applying the factors developed from prior case law. After careful consideration, the Circuit concluded: "an Ohio common pleas court is *not* a segment of county government, but an arm of the state for purposes of ... Eleventh Amendment immunity analyses." 105 F.3d at 269 (emphasis original). This holding remains undisturbed.

Instead, The United States relies upon two Ohio cases: *Dalton v. Bureau of Criminal Identification & Investigation*, 39 Ohio App. 3d 123, 530 N.E.2d 35 (1987) and *Tymcio v. State*, 52 Ohio App. 2d 298, 369 N.E.2d 1063 (1977). However, the Sixth Circuit expressly considered and rejected the arguments advanced by DOJ in *Mumford.* Discussing the impact of *Dalton* and *Tymcio* on its determination that common pleas courts are arms of the state, the court said:

> Nothing in either opinion mandates that a common pleas court should be construed as a component of county government for any purpose. To the contrary, those courts intimated that, in the broader sense, the common pleas courts remain instrumentalities of state government.

105 F.3d at 269, n. 7. Indeed, this holding is entirely consistent with the holding of Ohio's appellate courts. See *Dugan v. Civil Service Com'n of Akron*, 9 Ohio App. 3d 218, 219, 459 N.E.2d 618, 619 (1983) (an Ohio court is a creature of state constitutional and statutory law and is administered by state authorities; the state legislature has the authority to control the conditions of appointment, status, tenure, and discharge of court employees).

THE *ROOKER-FELDMAN*[4] DOCTRINE NO LONGER APPLIES TO THIS CASE

The United States' suggestion that review of claims for continuing injunctive relief are now barred by the doctrine of mootness is only correct if applied solely to the injunctive relief ordered in this case. However, the DOJ's argument rings hollow when considered alongside the fact that a money judgment has been entered against State Court. Unless the money judgment rendered in federal court is somehow mooted, the *Rooker-Feldman* doctrine does not bar review by this Court.

At issue now is the propriety of a money judgment against an Ohio State Court *for the manner in which it chose to accommodate Popovich's disability* during a disputed child custody and domestic violence hearing. This issue cannot be

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[4] This doctrine is based on this Court's holdings in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

construed as asking a federal court to review, directly or indirectly, a state court's judicial decision. As the *en banc* decision chose to focus solely on the constitutional grounds, the position advanced by the DOJ that the case is moot and must pass *Rooker-Feldman* before presenting the issue ignores the basis of the decision below and the facts of the dispute. However, if this Court accepts the DOJ mandatory review position and that *Rooker-Feldman* bars this action, then this Court should grant *certiorari*, vacate the decisions below, and direct entry of dismissal.

If the Court wishes to vacate and remand with directions to dismiss, then the State Court agrees that the money judgment for matters submitted to the State Court is barred. Thus, the application of the *Rooker-Feldman* doctrine was not at issue once the circuit addressed the constitutionality of Title II of the ADA *en banc*.

CONCLUSION

For these reasons, this case warrants the exercise of this Court's *certiorari* jurisdiction. The petition for a writ of *certiorari* should be granted on the important questions presented that have escaped review to date.

Respectfully submitted,

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In the Supreme Court of the United States

COURT OF COMMON PLEAS OF
CUYAHOGA COUNTY, OHIO
Petitioner,

v.

JOSEPH M. POPOVICH, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF OHIO AND 12 OTHER STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does Title II of the ADA, 42 U.S.C. §§ 12131 to 12165 (2002), exceed Congress's enforcement authority under section 5 of the Fourteenth Amendment, thereby failing to validly abrogate the States' Eleventh Amendment immunity from private damage claims?

2. Does the abrogation analysis of Title II of the ADA, 42 U.S.C. §§ 12131 to 12165 (2002), differ when an individual Title II claim is purportedly tied to due process concerns rather than equal protection concerns?

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STATEMENT OF *AMICI* INTEREST

The State of Ohio, joined by twelve other *amici* States, urges the Court to grant the petition, and to finally resolve whether the States retain their sovereign immunity from damages lawsuits filed under Title II of the Americans with Disabilities Act (ADA). In *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2000), this Court held that Congress had no power to abrogate the States' immunity from suits brought under the ADA's Title I, concerning employment. The Court found that Title I did not fall under Congress's power to enforce constitutional rights, as Title I created rights and remedies far beyond what the Constitution requires, and Congress was not responding to a pattern of previous constitutional violations by the States. In *Garrett*, the Court had granted certiorari to address the ADA's Title II as well, but the Court did not reach the issue, leaving the lower courts to address Title II again. *Garrett*, 531 U.S. at 360 n.1 (2001).

Since *Garrett*, the circuit courts of appeals have not only remained split on the Title II issue, but the split has taken a new and complicated direction, as shown by the Sixth Circuit's decision below. While most circuits have fallen on one side of the split or the other—*i.e.*, they have found that Title II validly abrogates, or that Title II does not validly abrogate—the Sixth Circuit has now joined the Second Circuit in saying that Title II plaintiffs may overcome State immunity *in certain factual circumstances*. The Second Circuit allows Title II plaintiffs to proceed in federal court if they show that the State's alleged Title II violation "was motivated by discriminatory animus or ill will towards the disabled." *Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn*, 280 F.3d 98, 111 (2d Cir. 2001). The Sixth Circuit has drawn a different line, but it has also adopted an as-applied approach to jurisdiction: it held that States are immune from Title II cases that are based upon "equal

protection-type claims," but it allows plaintiffs to overcome immunity if they advance a "due process-type claim." Pet. App. 8a-17a (reported as *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002) (en banc)). In this case, the Sixth Circuit held that it was unclear, even after a jury trial, whether plaintiff Popovich did have a "due process-type claim" or merely an "equal protection" one, so the court remanded for a new trial to resolve the question. Pet. App. 19a, 21a-23a.

The *amici* States write because we have a great interest in both questions presented here. We of course seek to resolve the issue of our immunity from Title II suits, as the lower courts remain split on this important issue. And we have an equally great interest in asking the Court to reject the whole notion of an "as-applied" approach to questions of Congressional abrogation of our immunity. Whether we States win or lose in challenging abrogation under a given statute, what we need most is certainty. Indeed, all parties, especially plaintiffs who need to know where to file a case, suffer when the fundamental question of jurisdiction is subject to an unworkable case-by-case approach. Thus, this Court's guidance is urgently needed.

REASONS FOR GRANTING THE WRIT

I. The Court Should Decide Whether States Are Immune From Damages Claims Filed Under Title II Of The Americans With Disabilities Act.

By any measure, the first question presented—whether Congress validly abrogated the States' immunity when it passed Title II of the ADA—warrants this Court's review. The circuits are split, and the issue is one of great importance. The ongoing uncertainty harms States and plaintiffs alike, and the issue should now be resolved.

A. The Circuits Remain Split On The Question Of Immunity From Title II Suits, And The Sixth Circuit's As-Applied Approach Complicates The Split.

The circuits were already split on this question when the Court decided *Garrett*, *see Garrett*, 531 U.S. at 363, and since then, the lower courts have remained divided. The Fifth, Eighth, and Tenth Circuits have held that Title II does not abrogate the States' immunity. *See Reickenbacker v. Foster*, 274 F.3d 974, 984 (5th Cir. 2001); *Randolph v. Rogers*, 253 F.3d 342, 345 n.4 (8th Cir. 2001); *Thompson v. State of Colorado*, 278 F.3d 1020, 1034 (10th Cir. 2001), *cert. denied*, 122 S. Ct. 1960 (2002). The Ninth Circuit has re-affirmed its pre-*Garrett* view that Title II does validly abrogate the States' immunity. *Hason v. Medical Bd. of California*, 279 F.3d 1167, 1171 (9th Cir. 2002).

The Second Circuit broke new ground by finding that abrogation is valid for a subset of Title II cases—and importantly, the Second Circuit established a fact-bound inquiry, based on the defendant's motivation, to determine whether the case would be allowed in federal court or not. *See Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn*, 280 F.3d 98 (2d Cir. 2001). If a plaintiff can establish that the State's alleged Title II violation "was motivated by discriminatory animus or ill will towards the disabled," the State is not entitled to Eleventh Amendment immunity in that particular case. *Id.* at 111.

The Sixth Circuit has now joined the Second Circuit in approaching immunity case-by-case, but it drew a different line, attempting to classify Title II claims into those that "sound in equal protection" and those that raise "due process-type claims." Under this taxonomy, States are immune from the equal protection-type claims, but are subject to federal jurisdiction over the due process-type claims. Pet. App. at

12a-17a. While the exact contours of this rule are unclear, as discussed in Part II below, the Sixth Circuit has plainly held that some Title II claims may proceed, while others may not.

Thus, the circuits are plainly split, and the issue is undoubtedly of great importance to all sides in the debate. Indeed, plaintiff-respondent Popovich has cross-petitioned for certiorari in this case, *see* Petition in No. 01-1517, and in another petition raising this same issue, the United States has acknowledged that "the question of Congress's power to abrogate the States' Eleventh Amendment immunity for claims under Title II of the Disabilities Act is an important question that may merit review by this Court at the appropriate time and in the appropriate case." 4-15-02 Brief of the United States in Opposition, *Thompson v. State of Colorado,* No. 01-1024 at 6, *cert. denied,* 122 S. Ct. 1960 (2002).

The *amici* States submit that this is the appropriate time and case, and this important issue should now be resolved.

B. This Case Is A Good Vehicle To Resolve The Title II Issue.

Because the Title II abrogation question is plainly ripe for review, the issue becomes whether this case is a good vehicle for that review. This case stands apart from those that answer the abrogation question with a simple yes or no, as the court below has adopted a factbound approach.

The Sixth Circuit's use of an as-applied, split-the-difference approach is precisely why this case is a superior vehicle, as it not only allows the Court to resolve the basic Title II question, but it also allows the Court to provide much-needed guidance to the lower courts on the second question presented. As shown in Section II below, that

question equally warrants review, as the lower courts need guidance on whether the Section Five/Eleventh Amendment inquiry should ever be resolved on an as-applied basis.

II. The Court Should Decide Whether The *Boerne* Analysis Allows For The Abrogation Issue To Be Resolved On An As-Applied Basis.

The Court should also grant the petition to review the second question presented, as the Sixth Circuit's as-applied approach conflicts with this Court's recent Eleventh Amendment cases. The fact-bound approach creates an unworkable scheme whereby the fundamental question of jurisdiction—which should of course be resolved pretrial and even pre-discovery—turns on factual disputes that may even remain unresolved until after a jury trial on the merits. This approach is a growing problem in the lower courts, so the issue warrants review now.

A. The Sixth Circuit's As-Applied Approach To Eleventh Amendment Immunity Conflicts With This Court's Decisions, And It Conflicts With The Fundamental Nature Of Jurisdiction.

In *Garrett*, the Court accurately described its Section Five analysis as a set of "now familiar principles." *Garrett*, 531 U.S. at 365. Under those principles, the Court takes several steps to determine whether a given Congressional enactment is justified by Congress's power, under Section Five of the Fourteenth Amendment, to enforce constitutional guarantees. First, the Court "identif[ies] with some precision the scope of the constitutional right at issue." *Id.* Second, the Court "examine[s] whether Congress identified a history and pattern of unconstitutional" State action in the area in question (such as employment discrimination against the disabled), as Congress's Section Five power "is

appropriately exercised only in response to state transgressions." *Id.* at 368. Third, whether the alleged "pattern" of State misbehavior seems great or small, the Court compares Congress's statutory remedy to the constitutional problem, to see if the remedial scheme is "congruent and proportional" to the problem it addresses. *Id.* at 374.

The Court has applied these principles several times in recent years, and several times Congress's handiwork has been found wanting. *See id.* at 360 (ADA Title I); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (Age Discrimination in Employment Act); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999) (Patent Remedy Act); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (Trademark Remedy Clarification Act); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Religious Freedom Restoration Act). In each case, the Court held that the statute at issue was not a valid exercise of Congress's enforcement power, because Congress was not responding to a pattern of State constitutional violations, and each statute granted rights and remedies far beyond what the Constitution requires.

Equally important, in each of these cases, the Court reviewed and rejected each challenged statute on its face; it did not measure congruence and proportionality as applied to a particular plaintiff's case. To be sure, the Court never used the terms "facial" or "as-applied" in discussing the challenges, but everything about the Court's analysis is inconsistent with the idea of as-applied abrogation. The question has always been whether Congress had the power to subject States to suit under a certain statute, or if Congress's act was proportional to the constitutional concern. The Court has never looked to any individual claim or measured a particular claim against the relevant constitutional guarantee.

In *Garrett*, for example, the Court compared Title I's *statutory provisions* to the Constitution's equal protection guarantees—it did not compare Ms. Garrett's allegations to the constitutional standard. *Garrett*, 531 U.S. at 365-68; *compare* Pet. App. at 11a-12a ("In defining the 'metes and bounds' of the constitutional right before us, we must consider whether plaintiff's due process-type claim to participate fully in the hearing in his child custody suit is an exception to Eleventh Amendment immunity.").

Moreover, when the Court has rejected abrogation attempts, it has never left open the possibility that some future plaintiff might "revive" a piece of the fallen statute if *her claim involved facts* that implicated an enforceable constitutional right. Under *Kimel*, State employees simply may not pursue ADEA damages claims against a State in federal court—even if the employee alleges that the State's treatment of her violated a rational-basis standard.

The Sixth Circuit did not cite any decision from this Court for the general notion that Congressional abrogation could be determined on an as-applied basis. Instead, the court simply stated that in defining the "metes and bounds" of the constitutional right at issue, it would examine "whether plaintiff's due process-type claim to participate fully in the hearing in his child custody suit" is the type of claim that would justify Congressional abrogation of immunity. The Sixth Circuit then cited several cases showing that this Court has in fact afforded due process protections to parents facing a loss of custody over their children. Pet. App. at 11a-13a, citing, *e.g.*, *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 27 (1981). The court concluded that "[a]s applied to the case before us, the 'participation' requirement of Title II serves to protect Popovich's due process right to a meaningful hearing." Pet. App. at 17a. Thus, said the court, Congress had valid Section Five power to require

accommodation in "child custody cases involving hearing-impaired parents." *Id.*

But Title II of course governs far more than "child custody cases involving hearing-impaired parents," and the Sixth Circuit's narrower approach cannot be squared with this Court's approach in *Garrett* and the other immunity cases. The Sixth Circuit's view essentially says that if a Congressional act fails the proportionality and congruence test, the courts should "trim back" the reach of the statute, so that federal courts have jurisdiction over those claims that are individually "proportional and congruent" to federal constitutional guarantees.

This is not to say that courts may not consider the Due Process clause as an alternate ground for justifying abrogation under Title II, but if courts do so, such a review should still comport with the systematic analysis mandated by *Boerne* and *Garrett*. For example, in *Florida Prepaid*, the Court examined whether the Patent Remedy Act could be justified as an enforcement of patentees' due process right not to be deprived of their patent-property, or more specifically, the patentees' due process right against unremedied patent infringement. *See* 527 U.S. at 639-47. Importantly, the Court there asked whether the Patent Remedy Act was a response to a *pattern* of unremedied patent infringement; it did not ask whether the claims of plaintiff College Savings Bank might implicate a constitutional claim.

Further, even if the Sixth Circuit was justified in looking only at "child custody cases involving hearing-impaired parents," as opposed to measuring Title II generally, it still should have asked whether Congress acted in response to a pattern of States' unconstitutional (and unremedied) violations in that area. While no such pattern exists here, the

more important point is that the court asked the wrong question.

Because the Sixth Circuit's decision cannot be reconciled with this Court's holdings in *Garrett*, *Boerne*, *Florida Prepaid*, and the other immunity cases, this case merits review.

B. The Sixth Circuit's As-Applied Approach Is Unworkable, Because It Requires Full Factfinding On A Claim's Merits, And Sometimes Even A Trial, Before The Trial Court Can Decide Whether It Has Jurisdiction Over The Claim.

The Sixth Circuit's as-applied approach to abrogation must be wrong, as it puts the merits cart before the jurisdictional horse. That is, the appeals court's view requires factfinding on a claim's merits, so that a court may determine if a plaintiff raises "due process-type claims"—but such factfinding clashes with the idea that Eleventh Amendment immunity is *jurisdictional*, and immunity should protect States from the indignity of suit and from pre-trial factfinding. *Seminole Tribe v. Florida*, 517 U.S. 44, 58 (1996).

While the decision below did not explain precisely how a court is to review claims for possible "due process type" status, it is hard to avoid the conclusion that some factfinding, leading up to some type of mini-trial or full-blown trial, will be needed. Indeed, the Sixth Circuit's treatment of Popovich's own claim demonstrates how far such factfinding will go. In this case, the district court had already held a full jury trial on Popovich's claims, yet the court of appeals was still unable to classify his claims as "equal protection-type" or "due process-type." The court could not be sure, it said, because Popovich framed his

claims under both types of "theories," and the jury's verdict may have been permissibly premised upon due process, or impermissibly premised upon equal protection. Thus, the court of appeals ordered a remand and re-trial, so that a jury could determine, under better-tailored jury instructions, whether Popovich had a due process-type claim after all. Pet. App. at 19a ("We reverse and remand the case for a new trial because the charge to the jury appears to permit the jury to find in favor of the plaintiff if it finds discrimination against him or exclusion from public proceedings based on equal protection principles.").

In ordering a remand, and ordering a *jury* to determine whether Popovich had a due process-type claim or not, the Sixth Circuit lost sight of the fact that immunity-or-abrogation is a *jurisdictional* issue, and as such should be decided (1) by a judge and (2) before a determination on the merits. While courts do have jurisdiction to allow some factfinding as needed to determine whether jurisdiction exists, that limited jurisdiction usually explores whether minimum contacts exist, or other preliminary issues; it does not bootstrap in a resolution of the merits. In this case, if the jury determines on remand that it does not find a "due process-type claim," that finding has implications beyond showing Popovich loses on the merits. Since the Sixth Circuit held that *jurisdiction* exists only if Popovich has a due process claim, then a jury finding against him on such a claim implies the court did not have jurisdiction over the claim. But that will be far too late for the State to avoid the expense and indignity of suit.

Some cases decided since *Popovich* suggest that some claims could be dismissed at the pleading stage. For example, in *Carten v. Kent State Univ.*, 282 F.3d 391 (6th Cir. 2002), the Sixth Circuit held that a plaintiff's claim did not overcome the State's immunity because he raised "no allegations that sound in due process," as that plaintiff

complained only "that he was denied access to public education;" he did not complain that he was denied "an opportunity to participate meaningfully in judicial proceedings." *Carten*, 282 F.3d at 395. And in an unreported decision, the Sixth Circuit upheld dismissal of a complaint where a prisoner's "allegations more closely resemble[d] an equal protection claim than a due process claim." *Moore v. Chavez*, 2002 U.S. App. Lexis 5205 (6th Cir. March 26, 2002), *6. However, these cases mean only that dismissal is possible when a plaintiff does not even *allege* a "due process type claim;" such a rule offers little solace to States that will now face plaintiffs who know, post-*Popovich*, to shout "due process" to survive a motion to dismiss.

Further, while the decision below said that abrogation was valid in "child custody cases involving hearing-impaired parents," it left open whether its reasoning would open the door to other claims that, in certain factual settings, might implicate recognized fundamental due process rights. The court cited only cases involving child custody, suggesting that the subject matter of the state-court case was crucial, but surely plaintiffs will argue that any case concerning courthouse access raises a due process claim. Or perhaps any claim concerning access to any government building or hearing is eligible for the category of "due process-type claim," and thus for an override of immunity.

In any case, the problem with the Sixth Circuit's approach does not turn on how broadly it extends its as-applied theory of abrogation, as any as-applied approach requires at least some attempt to classify a given claim, thus opening the door to factfinding and more. This uncertainty harms plaintiffs as well as State defendants, for it does not ever resolve whether a given plaintiff should file a claim in state or federal court. Rather, each plaintiff is implicitly encouraged to try her luck with an as-applied claim, and after years of litigation, may fail in her federal efforts, leaving her

then—if she wishes to pursue money damages—to belatedly turn her attention to state court if she still can.

Thus, the practical unworkability of the Sixth Circuit's approach warrants this Court's review now, before more cases and more parties go down this perilous path.

C. The Second Circuit's Alternative View Has Also Shown How Any Factbound Approach To Abrogation Is Unworkable.

The Second Circuit's approach differs from the Sixth Circuit's, but it is equally factbound, and thus equally unworkable. The underlying similarity between the Second and Sixth Circuit's approaches shows that the problem of as-applied abrogation is not isolated, but is part of a new trend that warrants review.

While the Sixth Circuit attempts to divide cases into categories of equal protection and due process, the Second Circuit winnows out cases from federal jurisdiction based on the State's motivation. It allows a Title II plaintiff to overcome a State's immunity if "the plaintiff can establish that the Title II violation was motivated by either discriminatory animus or ill will due to disability." *Garcia*, 280 F.3d at 112. The Second Circuit noted that direct proof of such animus is often lacking, so it specifically authorized use of a burden-shifting technique or a motivating-factor analysis. *Id.*, citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-58 (1989). Of course, such burden-shifting schemes inherently require discovery or other fact-finding, so the State will rarely if ever be entitled to dismissal under Rule 12(b)(1) for lack of jurisdiction. As long as a plaintiff alleges "discriminatory animus," he will likely proceed to at least the summary judgment stage.

Indeed, since *Garcia*, district courts in the Second Circuit have been sifting evidence at the summary judgment stage to see if a plaintiff raised a scintilla of evidence showing discriminatory animus. *See Hamilton v. City College of the City Univ. of N.Y.*, 173 F. Supp. 2d 181, 185 (S.D.N.Y. 2001) (finding that plaintiff did not allege or "proffer[] any evidence" of discriminatory animus or ill will); *Harris v. New York State Dep't*, 2002 U.S. Dist. Lexis 7179, at *87 (S.D.N.Y. April, 22, 2002) (finding that plaintiff did not allege that the State's action was motivated by irrational animus or ill will). In both *Hamilton* and *Harris*, the district court did note that the requisite discriminatory animus was not properly alleged, but in each case, the court also looked to particular documents or other evidence to see if those items constituted proof of animus. And of course, *Garcia* itself invites a *McDonnell-Douglas* inquiry and more.

Thus, despite the differences in the Second and Sixth Circuit's approaches, both versions of as-applied abrogation raise the same problems, both doctrinally and practically. The harms of the factbound approach are not confined to the Sixth Circuit, and this shows why the Court should not only resolve the long-simmering split over Title II of the ADA, but should also resolve whether Section Five analysis should ever take this as-applied form.

CONCLUSION

For the foregoing reasons, the *amici* States urge the Court to grant the petition.

Respectfully submitted,

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